No. 16-327

Title:	Jae Lee, Petitioner v. United States
Docketed:	September 14, 2016
Lower Ct:	United States Court of Appeals for the Sixth Circuit
Case Nos.:	(14-5369)
Decision Date:	June 8, 2016

Questions Presented

~~Date~~~	~~~~~~~~Proceedings and Orders~~~~~~~~~~~~~~~~~~~~~~~~
Sep 6 2016	Petition for a writ of certiorari filed. (Response due October 14, 2016)
Oct 11 2016	Order extending time to file response to petition to and including November 14, 2016.
Oct 14 2016	Brief amicus curiae of The National Association of Criminal Defense Lawyers filed.
Oct 14 2016	Brief amici curiae of Asian Americans Advancing Justice I AAJC, and Other Immigrants' Rights Groups filed.
Oct 14 2016	Brief amicus curiae of Center on the Administration of Criminal Law filed.
Nov 9 2016	Order further extending time to file response to petition to and including November 21, 2016.
Nov 10 2016	Letter of November 3, 2016, from counsel for petitioner received waiving the 14-day waiting period for the distribution of the petition pursuant to Rule 15.5.
Nov 21 2016	DISTRIBUTED for Conference of December 9, 2016.
Nov 21 2016	Brief of respondent United States in opposition filed. (Distributed)
Nov 23 2016	Reply of petitioner Jae Lee filed. (Distributed)
Dec 14 2016	Petition GRANTED.
Jan 26 2017	The time to file the joint appendix and petitioner's brief on the merits is extended to and including February 1, 2017.
Jan 26 2017	The time to file respondent's brief on the merits is extended to and including March 6, 2017.
Jan 30 2017	Consent to the filing of amicus curiae briefs, in support of either party or of neither party, received from counsel for the petitioners.
Feb 1 2017	Joint appendix filed. (Statement of costs filed)
Feb 1 2017	Brief of petitioner Jae Lee filed.
Feb 3 2017	SET FOR ARGUMENT on Tuesday, March 28, 2017
Feb 6 2017	Record requested from the U.S.C.A. 6th Circuit.
Feb 6 2017	Brief amici curiae of Asian Americans Advancing Justice I AAJC, et al. filed.
Feb 7 2017	Record received from the U.S.C.A. 6th Circuit. The record is electronic and available on PACER. One restricted document also received.
Feb 8 2017	Brief amicus curiae of National Association of Criminal Defense Lawyers filed.
Feb 8 2017	Brief amicus curiae of Constitutional Accountability Center filed.
Feb 8 2017	Brief amicus curiae of The Cato Institute filed.
Feb 8 2017	Brief amicus curiae of The American Bar Association filed.
Feb 8 2017	Brief amici curiae of Immigrant Defense Project, et al. filed.

Feb 22 2017	CIRCULATED.
Mar 6 2017	Brief of respondent United States filed. (Distributed)
Mar 13 2017	Brief amici curiae of Alabama, et al. filed. (Distributed)
Mar 20 2017	Reply of petitioner Jae Lee filed. (Distributed)
Mar 28 2017	Argued. For petitioner: John J. Bursch, Caledonia, Mich. For respondent: Eric J. Feigin, Assistant to the Solicitor General, Department of Justice, Washington, D. C.
Jun 23 2017	Judgment REVERSED and case REMANDED. Roberts, C. J., delivered the opinion of the Court, in which Kennedy, Ginsburg, Breyer, Sotomayor, and Kagan, JJ., joined. Thomas, J., filed a dissenting opinion, in which Alito, J., joined except as to Part I. Gorsuch, J., took no part in the consideration or decision of the case.
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AND
BRIEFS

16-327

Supreme Court, U.S.
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No. _____

IN THE

Supreme Court of the United States

JAE LEE, *Petitioner*,

v.

UNITED STATES OF AMERICA, *Respondent*.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

To establish prejudice under *Strickland* v. *Washington*, 466 U.S. 668 (1984), a defendant who has pleaded guilty based on deficient advice from his attorney must show "a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial." *Hill* v. *Lockhart*, 474 U.S. 52, 59 (1985). In the context of a noncitizen defendant with longtime legal resident status and extended familial and business ties to the United States, the question that has deeply divided the circuits is whether it is always irrational for a defendant to reject a plea offer notwithstanding strong evidence of guilt when the plea would result in mandatory and permanent deportation.

PARTIES TO THE PROCEEDING

There are no parties to the proceeding other than those listed in the caption. Petitioner is Mr. Jae Lee. Respondent is the United States of America.

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

PARTIES TO THE PROCEEDING ii

TABLE OF AUTHORITIES v

OPINIONS BELOW 1

JURISDICTION 1

CONSTITUTIONAL PROVISION INVOLVED 1

INTRODUCTION 2

STATEMENT 4

A. Ineffective assistance in the context of a deportable offense 4

B. Mr. Jae Lee 5

C. The indictment 5

D. Mr. Lee's legal representation 6

E. Proceedings below 8

REASONS FOR GRANTING THE PETITION 12

I. The Court should grant the petition to resolve a deep and mature circuit conflict ... 12

II. The Court should grant the petition and reverse because it would not have been irrational for Mr. Lee to reject the plea agreement had he been properly advised of the deportation consequences 20

III. The question presented is of national importance and requires prompt resolution, and this case is an ideal vehicle for resolving that question 23

CONCLUSION 25

PETITION APPENDIX TABLE OF CONTENTS

United States Court of Appeals for the Sixth Circuit, Opinion in 14-5369, Issued June 8, 2016 ..... 1a–10a

United States District Court for the Western District of Tennessee, Order Adopting in Part and Rejecting in Part Report and Recommendation, Denying Motion Pursuant to 28 U.S.C. § 2255 and Granting a Limited Certificate of Appealability in 2:10-cv-02698-JTF-dkv, Issued March 20, 2014 ..... 11a–50a

United States District Court for the Western District of Tennessee, Report and Recommendation in 2:10-cv-02698-JTF-dkv, Issued August 6, 2013 ..... 51a–77a

TABLE OF AUTHORITIES

Page(s)

Cases

Chaidez v. *United States*,
133 S. Ct. 1103 (2013) 3, 8, 11, 18

DeBartolo v. *United States*,
790 F.3d 775 (7th Cir. 2015) ..... passim

Gonzalez v. *United States*,
722 F.3d 118 (2d Cir. 2013) 13

Haddad v. *United States*,
486 F. App'x. 517 (6th Cir. 2012) 2, 11, 23

Hernandez v. *United States*,
778 F.3d 1230 (11th Cir. 2015) 3, 11, 19, 20

Hill v. *Lockhart*,
474 U.S. 52 (1985) ..... i, 4

Kovacs v. *United States*,
744 F.3d 44 (2d Cir. 2014) ..... passim

Padilla v. *Kentucky*,
559 U.S. 356 (2010) ..... passim

Pilla v. *United States*,
668 F.3d 368 (6th Cir. 2012) ..... passim

Strickland v. *Washington*,
466 U.S. 668 (1984) ..... passim

United States v. *Akinsade*,
686 F.3d 248 (4th Cir. 2012) 3, 11, 14

United States v. *Gajendragadkar*,
1998 WL 352886 (4th Cir. June 3,
1998) 15

TABLE OF AUTHORITIES—Continued

Page(s)

United States v. *Kayode*,
777 F.3d 719 (5th Cir. 2014).....3, 11, 12, 13

United States v. *Orocio*,
645 F.3d 630 (3d Cir. 2011) 3, 11, 18, 22

United States v. *Rodriguez-Vega*,
797 F.3d 781 (9th Cir. 2015).....3, 11, 19

Statutes

8 U.S.C. § 1101 .....2, 5, 21

8 U.S.C. § 1227 .....2, 5

8 U.S.C. § 1229b 21

21 U.S.C. § 841 .....2, 5, 6

26 U.S.C. § 7203 21

26 U.S.C. § 7204 21

26 U.S.C. § 7205 21

28 U.S.C. § 1254 1

28 U.S.C. § 2255 ..... passim

Other Authorities

U.S. Const. amend. VI.....1

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Sixth Circuit, App. 1a–10a, is reported at 825 F.3d 311. The opinion of the United States District Court for the Western District of Tennessee, App. 11a–50a, is not reported but is available at 2014 WL 1260388. The Report and Recommendation of the Magistrate, 51a–77a, is not reported but is available at 2013 WL 8116841.

JURISDICTION

The judgment of the court of appeals was entered on June 8, 2016. App. 1a. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

The Sixth Amendment to the United States Constitution provides in relevant part:

> In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence.

INTRODUCTION

Jae Lee moved from South Korea to the United States with his family in 1982 and has lived here legally ever since. After completing high school, Mr. Lee moved to Memphis, Tennessee, and became a successful restauranteur. Regrettably, he also started using—and sharing—ecstasy at parties and was charged in 2009 with possession of ecstasy with intent to distribute under 21 U.S.C. § 841(a)(1).

Because the evidence against Mr. Lee was considered quite strong, his attorney advised him to plead guilty in exchange for a shorter sentence. The attorney assured Mr. Lee that the plea would not subject him to deportation, but that advice was wrong. Possession of ecstasy with intent to distribute is an aggravated felony that results in mandatory and permanent deportation. See 8 U.S.C. §§ 1101(a)(43)(B), 1227 (a)(2)(A)(iii); 1182(a)(9)(A)(i).

Upon learning of this consequence, Mr. Lee moved to vacate his conviction and sentence under 28 U.S.C. § 2255, claiming ineffective assistance of counsel. The government concedes that Mr. Lee's attorney provided deficient performance, the first part of the familiar two-part test under *Strickland* v. *Washington*, 466 U.S. 668, 687 (1984). The question is whether Mr. Lee can demonstrate prejudice under the second part of *Strickland* where he is deemed to be facing strong evidence of guilt. App. 3a.

As the Sixth Circuit panel noted, there is a "growing circuit split" over the answer to that question. App. 5a. The panel identified the Second, Fourth, Fifth, and Sixth Circuits as all holding that a defendant in Mr. Lee's position is not entitled to relief. App. 4a (citing *Pilla* v. *United States*, 668 F.3d 368, 373 (6th Cir. 2012); *Haddad* v. *United States*,

486 F. App'x. 517, 521–22 (6th Cir. 2012); *Kovacs* v. *United States*, 744 F.3d 44, 52–53 (2d Cir. 2014); *United States* v. *Akinsade*, 686 F.3d 248, 255–56 (4th Cir. 2012); *United States* v. *Kayode*, 777 F.3d 719, 724–29 (5th Cir. 2014)).

Conversely, said the panel, the Third, Seventh, Ninth, and Eleventh Circuits have all "reached the opposite conclusion." App. 4a (citing *United States* v. *Orocio*, 645 F.3d 630, 643–46 (3d Cir. 2011), *abrogated on other grounds by Chaidez* v. *United States*, 133 S. Ct. 1103 (2013); *DeBartolo* v. *United States*, 790 F.3d 775, 777–80 (7th Cir. 2015); *United States* v. *Rodriguez-Vega*, 797 F.3d 781, 789–90 (9th Cir. 2015); *Hernandez* v. *United States*, 778 F.3d 1230, 1234 (11th Cir. 2015)).

Because the Sixth Circuit had previously placed itself on the side of the government, the panel lacked the authority "to change camps." App. 4a. But the panel noted the incongruity of the result: "It is unclear to us why it is in our national interests—much less the interests of justice—to exile a productive member of our society to a country he hasn't lived in since childhood for committing a relatively small-time drug offense." App. 10a.

Regardless of which circuit "camp" is correct, certiorari is warranted. It cannot be the case that ineffective assistance of counsel in some circuits results in mandatory and permanent deportation, while the exact same conduct in other circuits results in relief and an opportunity to negotiate a new plea or go to trial. Because only this Court can resolve the mature circuit conflict with respect to the recurring issue presented, the petition for certiorari should be granted.

STATEMENT

A. Ineffective assistance in the context of a deportable offense

A defendant's ineffective-assistance claim is evaluated using a two-part test: (1) whether the attorney performance was deficient; and (2) if so, whether the deficient performance prejudiced the defendant. *Strickland*, 466 U.S. at 687. To prevail on the second part of the test in the context of a guilty plea, a defendant must show "a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial." *Hill* v. *Lockhart*, 474 U.S. 52, 59 (1985). This test is objective; a defendant who pled guilty because of ineffective assistance "must convince the court that a decision to reject the plea bargain would have been *rational under the circumstances*." *Padilla* v. *Kentucky*, 559 U.S. 356, 372 (2010) (emphasis added).

In *Padilla*, this Court considered the ineffective-assistance claim of a defendant whose guilty plea likewise subjected him to deportation. The Court concluded that the "weight of prevailing professional norms supports the view that counsel must advise her client regarding the risk of deportation." *Id.* at 367. "[W]hen the deportation consequence is truly clear, . . . the duty to give correct advice is equally clear." *Id.* at 369. Because Mr. Padilla satisfied *Strickland*'s ineffective-assistance prong, the Court remanded the case for the lower courts to consider the prejudice prong. *Id.* In sum, *Padilla* stands for the proposition that the Sixth Amendment requires an attorney to inform his criminal-defendant client about the risk of deportation flowing from a guilty plea.

This case is different than *Padilla*. As explained below, rather than claim his attorney failed to advise, Mr. Lee claims his attorney affirmatively *misadvised* him that there would be no deportation consequences to his plea. And because the "government concedes that Lee has satisfied the first [ineffective-assistance] prong," the only question is whether Lee can satisfy the prejudice prong. App. 3a.

B. Mr. Jae Lee

Mr. Lee is a lawful permanent resident who emigrated to the U.S. from South Korea in 1982, when he was 13 years old. App. 48a. He was educated in the United States, and he has never returned to the country of his birth. *Ibid.* For more than 20 years, Mr. Lee has lived in Memphis, Tennessee, owning and operating two restaurants. *Ibid.* Mr. Lee's mother and father are U.S. citizens living in Brooklyn, New York, who naturalized after Mr. Lee was an adult. *Ibid.* Mr. Lee's parents are elderly, and he is "the only child left to care for them." *Ibid.*

C. The indictment

Although a successful businessman with no previous criminal convictions, Mr. Lee had a problem with the drug ecstasy, a recreational drug that induces euphoria. Acting on a tip, law enforcement officers executed a search warrant at Mr. Lee's home on January 6, 2009, and recovered 88 ecstasy pills. App. 47a. Mr. Lee was charged with possessing ecstasy with the intent to distribute in violation of 21 U.S.C. § 841(a). *Ibid.* Conviction of this charge is an "aggravated felony" that results in mandatory and permanent deportation. 8 U.S.C. §§ 1101(a)(43)(B), 1227(a)(2)(A)(iii); 1182(a)(9)(A)(i).

D. Mr. Lee's legal representation

Larry E. Fitzgerald represented Mr. Lee, who initially pled not guilty. App. 53a–54a. At an evidentiary hearing, Mr. Fitzgerald testified that Mr. Lee's case was "a bad case to try" because there was no basis to attack the search of Mr. Lee's home, and the number of pills and other evidence undermined any defense that the ecstasy was all for Mr. Lee's personal use rather than distribution. App. 54a.

In Mr. Fitzgerald's discussions with Mr. Lee, Lee "repeatedly raised the question of deportation and indicated that it was his *main concern* in deciding how to proceed." App. 54a (emphasis added). Mr. Fitzgerald admitted that he did not practice immigration law and was unaware that a guilty plea to a violation of 21 U.S.C. § 841(a)(1) would result in automatic, mandatory deportation. *Ibid.* Mr. Fitzgerald did not consult with an immigration lawyer for assistance. App. 54a–55a.

In February 2009, Messrs. Lee and Fitzgerald participated in a proffer session with the government. App. 55a. In exchange for a guilty plea, the government agreed to deduct three points for acceptance of responsibility (which reduced Mr. Lee's offense level to 17), making the statutory safety valve applicable. *Ibid.* Mr. Fitzgerald told Mr. Lee he would likely face a three-to-five-year prison sentence if he went to trial, while the plea would result in a much shorter term or possibly even probation. *Ibid.* Mr. Fitzgerald also told Mr. Lee that the government was not seeking to deport Lee as part of the proposed plea agreement. *Ibid.*

Mr. Lee accepted the deal and pled guilty on June 17, 2009. App. 56a. Mr. Fitzgerald testified that Mr. Lee's belief that he would not be deported was "the key to [Lee's] decision." *Ibid.* Mr. Fitzgerald also testified that if Mr. Lee had known a guilty plea would result in deportation, Lee would probably have chosen to proceed to trial, and Mr. Fitzgerald would have advised him to do so. *Ibid.* Mr. Lee testified that he would absolutely have accepted the risk of going to trial if he had known a plea would result in his deportation. *Ibid.*

At the change-of-plea hearing, the court informed Mr. Lee that deportation and ineligibility for citizenship were potential consequences of his guilty plea, and the court asked Mr. Lee if those consequences affected his decision to plead guilty. App. 57a. Mr. Lee said yes, then answered "I don't understand" when asked how these consequences affected his decision. *Ibid.*

On September 28, 2009, Mr. Lee was sentenced to an incarceration period of 12 months and a day. App. 57a. Mr. Lee soon learned that the correctional facility where he had been assigned was a special one that "exclusively housed federal inmates" facing deportation after completing their sentences. App. 58a. A short time later, Mr. Lee's case manager told him that his conviction rendered him deportable, and that removal proceedings were imminent. *Ibid.* On September 24, 2010, Mr. Lee filed *pro se* his motion for habeas relief under 28 U.S.C. § 2255, claiming ineffective assistance of counsel. App. 58a–59a.

At the evidentiary hearing in the district court, Mr. Lee testified that Mr. Fitzgerald affirmatively advised him regarding the plea: "You have been in the United States so long they cannot deport you.

Even if they want to deport you, it's not in the plea agreement, the government cannot deport you." App. 56a. As the Magistrate found in her Report and Recommendation, the "testimonies of Lee and Fitzgerald were consistent that deportation was the determinative issue in Lee's decision whether to accept the plea deal." *Ibid.* Mr. Lee also testified that after he said "I don't understand" at the plea hearing, he looked to Mr. Fitzgerald for guidance. Fitzgerald assured Lee that he could disregard the deportation warning because it was only a "standard warning for non-U.S. citizen[s]." App. 57a.

E. Proceedings below

At the time of Mr. Lee's evidentiary hearing in this case, there was a circuit split as to whether this Court's decision in *Padilla*, 559 U.S. 356, applied retroactively. Proceedings were stayed when this Court granted certiorari to answer that question, and on February 20, 2013, this Court held in *Chaidez* v. *United States*, 133 S. Ct. 1103 (2013), that *Padilla* did not apply retroactively to cases like Mr. Lee's that were on collateral review at the time of the decision.

Mr. Lee acknowledges that *Chaidez* forecloses his ability to rely on *Padilla* to vacate his conviction in this case. But he contends that his plea should still be set aside and his conviction vacated based on Mr. Fitzgerald's affirmative *mis*advice regarding the deportation consequences of the plea. The lower courts in this case have all agreed that *Chaidez* does not bar Mr. Lee from claiming affirmative misadvice, thus framing the question as whether Mr. Lee can satisfy the two-part test for showing ineffective assistance under *Strickland*, 446 U.S. 668.

In the district court, the Magistrate concluded that Mr. Lee satisfied the deficient-performance prong because Mr. Fitzgerald "affirmatively misadvised Lee as to the immigration consequences of pleading guilty to the drug-trafficking crime for which Lee was indicted." App. 73a. As for the prejudice prong, the government argued that going to trial would not have been rational given the overwhelming evidence of Mr. Lee's guilt. This was in contrast to the government's position in an earlier pleading, when the government conceded that Mr. Fitzgerald's deficiency "prejudiced the petition" because Mr. Lee "would not have pleaded guilty but insisted on going to trial" had he understood the deportation consequences of a plea. App. 73a. Mr. Lee contended that "his life-bonding ties are in the United States," and he "had nothing to lose by going to trial if the alternative was to be deported," because he no longer had any connection to South Korea. App. 75a.

The Magistrate acknowledged that the prejudice test is objective, not subjective, and that "a prediction of the likely outcome at trial is frequently dispositive of the inquiry." App. 75a (citation omitted). But the Magistrate concluded that Mr. Lee had established prejudice because if he had known that a plea would result in mandatory deportation, "*it would have been [objectively] rational for him to choose to go to trial*, whatever the likelihood of success and even though he might face one to five years greater a sentence than if he had pled guilty, because under the circumstances, deportation was, objectively, at least as undesirable as any prison sentence." App. 76a (emphasis added). The Magistrate recommended granting Mr. Lee's habeas petition.

The government objected to the Report and Recommendation, which the district court adopted and rejected in part, ultimately denying Mr. Lee's § 2255 motion. The court said that although the Report and Recommendation purported to apply an objective standard, its prejudice analysis, focusing on Mr. Lee's desire to avoid deportation, was subjective. "The proper focus under an objective standard," said the court, "is on whether a reasonable defendant in Lee's situation would have accepted the plea offer and changed his plea to guilty." App. 46a. "In light of the overwhelming evidence of Lee's guilt, a decision to take the case to trial would have almost certainly resulted in a guilty verdict, a significantly longer prison sentence, and subsequent deportation." *Ibid.* The district court certified the issue for appeal.

The Sixth Circuit affirmed. It began its analysis by noting Mr. Fitzgerald's erroneous advice and the government's concession that Mr. Lee satisfied the deficient-performance prong of the *Strickland* test. Turning to the prejudice test, the court noted that whether Mr. Lee satisfied the standard was "not immediately obvious," App. 3a, because:

> On the one hand, the district court's conclusion that the evidence of guilt was "overwhelming" is not clearly erroneous, and deportation would have followed just as readily from a jury conviction as from a guilty plea. . . . On the other hand, . . . we do not doubt Lee's contention that many defendants in his position, had they received accurate advice from counsel, would have decided to risk a longer prison sentence in order to take their chances at trial, slim though they were. [App. 3a–4a.]

Asking whether it would be "rational" to reject a plea that would result in deportation where the evidence of guilt was strong, the Sixth Circuit noted that four circuits have said no: "being denied the chance to throw 'a Hail Mary' at trial does not by itself amount to prejudice." App. 4a (citing *Pilla* v. *United States*, 668 F.3d 368, 373 (6th Cir. 2012); *Haddad* v. *United States*, 486 F. App'x. 517, 521–22 (6th Cir. 2012); *Kovacs* v. *United States*, 744 F.3d 44, 52–53 (2d Cir. 2014); *United States* v. *Akinsade*, 686 F.3d 248, 255–56 (4th Cir. 2012); *United States* v. *Kayode*, 777 F.3d 719, 724–29 (5th Cir. 2014)). (The ultimate holdings in *Kovacs* and *Akinsade* actually went the other way.)

But the court acknowledged that four other circuits (actually six, including *Kovacs* and *Akinsade*) "have reached the opposite conclusion." App. 4a (citing *United States* v. *Orocio*, 645 F.3d 630, 643–46 (3d Cir. 2011), *abrogated on other grounds by Chaidez* v. *United States*, 133 S. Ct. 1103 (2013); *DeBartolo* v. *United States*, 790 F.3d 775, 777–80 (7th Cir. 2015); *United States* v. *Rodriguez-Vega*, 797 F.3d 781, 789–90 (9th Cir. 2015); *Hernandez* v. *United States*, 778 F.3d 1230, 1234 (11th Cir. 2015)).

Bound by the decision in *Pilla*, the panel noted it had no ability "to change camps." App. 4a. But "given the growing circuit split," the court elaborated on the bases for the disagreement. See App. 5a–10a.

The panel emphasized that its conclusion "should not be read as endorsing Lee's impending deportation." App. 10a. "It is unclear to us why it is in our national interests—much less the interests of justice—to exile a productive member of our society to a country he hasn't live in since childhood for committing a relatively small-time drug offense." *Ibid.*

REASONS FOR GRANTING THE PETITION

I. The Court should grant the petition to resolve a deep and mature circuit conflict.

Is it always irrational for a defendant facing strong evidence of guilt on a deportable offense to exercise his right to go to trial? Two circuits say "no"; six circuits say "yes." Until this Court establishes a uniform rule, whether a defendant in Mr. Lee's position receives his constitutional right to counsel depends entirely on geography.

1. The Fifth and Sixth Circuits have held that strong evidence of guilt precludes a defendant from establishing *Strickland* prejudice in the context of a defendant's plea to a deportable offense based on ineffective assistance. In *Pilla*, 668 F.3d 368, a citizen and native of India pled guilty to making false statements based on her lawyer's erroneous advice that she would not be deported for the offense. *Id.* at 371. After she was ordered removed in an immigration proceeding based on the conviction, she petitioned for a writ of *coram nobis* based on ineffective assistance of counsel. The Sixth Circuit held Pilla could not prove prejudice because she "faced overwhelming evidence of her guilt." *Id.* at 373. Had she gone to trial, she would have still been convicted and subject to deportation; the only consequence of her attorney's bad advice "is that she got a shorter prison term than otherwise." *Id.*

The Fifth Circuit reached the same conclusion in *Kayode*, 777 F.3d at 724–29. Two years after becoming a naturalized citizen, Kayode pled guilty to mail fraud, aggravated identity theft, and unlawful procurement of naturalization after his lawyers failed to

warn him that he could lose his citizenship and be deported for those offenses. *Id.* at 723. Kayode attacked his plea and conviction by motion pursuant to 28 U.S.C. § 2255 on the ground of ineffective assistance of counsel. The Fifth Circuit concluded that there was a material question of fact whether Kayode's counsel's assistance was deficient under *Padilla*. *Id.* at 723–24. But it held that Kayode could not establish *Strickland* prejudice because "there was 'overwhelming evidence against Kayode.' " *Id.* at 725–26. The Fifth Circuit agreed that Kayode had substantial connections to the United States, which made it "more reasonable for someone in Kayode's circumstances to risk going to trial rather than face deportation." *Id.* at 727. Yet, because Kayode almost certainly would have been convicted (and deported) had he gone to trial, the Fifth Circuit thought it "unlikely that a rational person in Kayode's position would have proceeded to trial." *Ibid.*

Judge Dennis dissented: "A mentally competent defendant . . . has the constitutional right to insist on going to trial rather than pleading guilty, even if the strength of the prosecution's evidence may make that insistence seem irrational." *Id.* at 737 (Dennis, J., dissenting) (quoting *Gonzalez* v. *United States*, 722 F.3d 118, 132–33 (2d Cir. 2013)). As a result, Kayode did not need to "go so far as demonstrating that he necessarily would have been acquitted based on his defense to the charges." *Ibid.* "Rather, he must establish that 'a decision to reject the plea bargain would have been rational under the circumstances.' " *Ibid.* (quoting *Padilla*, 559 U.S. at 372). Judge Dennis would have reversed and remanded for an evidentiary hearing. *Id.* at 738.

2. The Second, Third, Fourth, Seventh, Ninth, and Eleventh Circuits have concluded that defendants like Mr. Lee can show prejudice. The Sixth Circuit panel in the present case suggested that two of these circuit decisions—the Fourth Circuit's decision in *Akinsade*, 686 F.3d at 255–56, and the Second Circuit's decision in *Kovacs*, 744 F.3d 44—supported its decision against Mr. Lee. See App. 4a. In fact, those circuits' decisions support Mr. Lee, and decisions of the Third, Seventh, Ninth, and Eleventh Circuits even more so.

The facts in *Akinsade* are similar to those of Mr. Lee's case. Akinsade, a Nigerian citizen, came to the United States legally at the age of seven and became a lawful permanent resident in May 2000. 686 F.3d at 250. But in 1999, when Akinsade was 19 years old and working as a bank teller, he cashed checks for several acquaintances who were not payees on the checks, and he deposited some of the proceeds into his own account. *Ibid.* He pled guilty to embezzlement-by-bank-employee after his lawyer told him, incorrectly, that he could not be deported for that offense. *Ibid.* Nine years later, however, he was charged with removability as an aggravated felon, and petitioned for a writ of *coram nobis*. *Id.* at 251.

Despite overwhelming evidence of Akinsade's guilt—he reported his actions to the bank and agreed to cooperate with the FBI, *id.* at 250—the Fourth Circuit held that he had established *Strickland* prejudice. *Id.* at 235–55. The Fourth Circuit relied in part on a previous, unpublished opinion finding *Strickland* prejudice where a defendant, misadvised by counsel about deportation consequences, had "significant familial ties to the United States and thus would reasonably risk going to trial instead of

pleading guilty and facing certain deportation." *Id.* at 255 (citing *United States* v. *Gajendragadkar*, 1998 WL 352886, at *2 (4th Cir. June 3, 1998)). The Fourth Circuit granted Akinsade's petition.

The Second Circuit's decision in *Kovacs*, 744 F.3d at 52–53, also supports Mr. Lee's position. Kovacs, an Australian national but permanent U.S. resident, founded a company that lost $250,000 in a burglary. An insurance adjustor persuaded Kovacs to inflate the amount of the claim, which was submitted to and paid by the insurance company. The government charged Kovacs with wire fraud and conspiracy, and Kovacs instructed his lawyer "to negotiate a plea that would have no immigration consequences." *Id.* at 48. The lawyer mistakenly advised Kovacs to plead guilty because doing so would have no immigration consequences. Kovacs served his sentence and received an early termination of his probation. But three years later, immigration officials directed him to appear for possible deportation.

Kovacs petitioned for *coram nobis* relief and focused on the fact that he could have negotiated an alternate plea, one that would not have resulted in deportation. The Second Circuit agreed with Kovacs: "a defense lawyer's incorrect advice about the immigration consequences of a plea is prejudicial if it is shown that, but for counsel's unprofessional errors, there was a reasonable probability that the petitioner could have negotiated a plea that did not impact immigration status or that he would have litigated an available defense." *Id.* at 52.

The Second and Fourth Circuits' decisions are aligned with decisions of the Third, Seventh, Ninth, and Eleventh Circuits. The strongest support for Mr. Lee's position is the Seventh Circuit's decision in

DeBartolo, 790 F.3d 775 (Posner, J.). DeBartolo immigrated to the U.S. from Italy with his family as a child but, like Mr. Lee, never applied for U.S. citizenship. Over the next 48 years, he developed deep familial and cultural ties to the United States. Charged with possessing with intent to distribute more than 100 marijuana plants, DeBartolo cooperated with the government and pled guilty, resulting in a sentence of only 25 months. "[U]nbeknownst to DeBartolo, and also it seems to his lawyer, the prosecutors, and the judge, his conviction of the drug offense made him deportable." *Id.* at 777. When removal proceedings were instituted against him, DeBartolo filed a motion under 28 U.S.C. § 2255(a).

Although DeBartolo's counsel's advice was deficient under *Padilla*, the government argued—and the district court had agreed—"that the evidence [wa]s so stacked against DeBartolo that he would not in fact have insisted on a trial even if he'd known he'd be deported as a consequence of pleading guilty and therefore of being convicted." 790 F.3d at 778. The Seventh Circuit noted that "[j]udges and prosecutors should hesitate to speculate on what a defendant would have done in changed circumstances." *Ibid.* The court then recognized that sometimes juries acquit criminal defendants even in the face of overwhelming evidence: "in light of the growing movement to legalize the sale of marijuana and the absence of any suggestion of guns or violence associated with DeBartolo's criminal activity, a jury might have thought his offense trivial and either acquitted him or convicted him of some lesser offense," one "which would not have been a basis for mandatory deportation." *Id.* at 779. "We don't condone jury nullification," but "a criminal defendant cannot be denied the right to a trial, and forced to

plead guilty, because he has no sturdy legal leg to stand on but thinks he has a chance that the jury will acquit him even if it thinks he's guilty." *Ibid.*

Like the Second Circuit in *Kovacs*, the Seventh Circuit also recognized that DeBartolo "could have tried to negotiate a different plea deal for an offense that does not make deportation mandatory." 790 F.3d at 779. DeBartolo "might even have preferred a lengthy prison term in the United States to a shorter prison term that would lead more quickly to deportation, because the lengthy prison term would at least keep him in the same country as his family, facilitating frequent visits by family members, which is important to prisoners." *Id.* at 780.

Finally, the Seventh Circuit considered the broader context: "the disarray in the enforcement of U.S. immigration law" and the "constant calls for reform of the laws themselves and of the methods of enforcing them." 790 F.3d at 780. Even if convicted following a trial, "DeBartolo may not be deported when he is released from prison." *Ibid.* "His subjecting himself to a trial rather than remaining in Italy and trying to acclimate himself to an alien culture far from his large family is a risky venture but not an irrational or even a reckless one," even at the time he would have been forced to make that decision. *Ibid.* "The probability that he will come out ahead by taking that course may be small, but it is not trivial. He is entitled to roll the dice." *Ibid.* The Seventh Circuit granted the petition. *Ibid.*

The Third Circuit reached the same conclusion in *Orocio*, 645 F.3d 630, *abrogated on other grounds by Chaidez*, 133 S. Ct. 1103. Orocio, a Philippine citizen, became a lawful permanent U.S. resident in 1997 but was arrested for drug trafficking in 2003. He pled

guilty, but his attorney failed to advise him of the deportation consequences. When Orocio was placed in removal proceedings after he completed his sentence, he filed a petition for *coram nobis*. The Third Circuit, applying *Padilla* retroactively, concluded that Orocio had satisfied the deficient-performance prong of *Strickland* and thus focused on whether Orocio could prove prejudice.

The district court had concluded there was no prejudice because of the strength of the government's evidence: "Orocio had not shown that he would have been acquitted, had he gone to trial." 645 F.3d at 643. The Third Circuit rejected that standard, noting that this Court "requires only that a defendant could have rationally gone to trial in the first place, and it has never required an affirmative demonstration of likely acquittal at such a trial as the *sine qua non* of prejudice." *Ibid.* (citation omitted). For "the alien defendant most concerned with remaining in the United States, especially a legal permanent resident, it is not at all unreasonable to go to trial and risk a ten-year sentence and guaranteed removal, but with the chance of acquittal and the right to remain in the United States." *Id.* at 645. Orocio "rationally could have been more concerned about a near-certainty of multiple decades of banishment from the United States than the possibility of a single decade in prison." *Ibid.* Accordingly, the Third Circuit reversed and remanded for an evidentiary hearing.

The Ninth Circuit followed suit in *Rodriguez-Vega*, 797 F.3d 781, yet another instance of counsel failing to adequately advise a defendant of deportation consequences following a plea. Elizabeth Rodriguez-Vega was a Mexican citizen who came to the United States with her family at age 12 and who

had been a lawful permanent resident for 22 years before being charged with a felony for attempted transportation of illegal aliens. Following her plea, Rodriguez-Vega was issued a Notice to Appear alleging that she was removable, and she filed a petition to vacate her conviction under 28 U.S.C. § 2255 based on ineffective assistance.

The Ninth Circuit held that Rodriguez-Vega satisfied *Strickland*'s performance prong under *Padilla* and then turned to prejudice. The Ninth Circuit concluded that Rodriguez-Vega could demonstrate prejudice for either of two reasons. First, she could have negotiated a plea bargain that would not result in her removal. 797 F.3d at 788–89. Second, it "is often reasonable for a non-citizen facing nearly automatic removal to turn down a plea and go to trial risking a longer prison term, rather than to plead guilty to an offense rendering her removal virtually certain." *Id.* at 789. This was so even if Rodriguez-Vega had known "removal was virtually certain" if she went to trial. *Id.* at 790.

Finally, in *Hernandez*, 778 F.3d 1230, a Cuban citizen filed a 28 U.S.C. § 2255 petition to vacate his sentence after pleading guilty to marijuana possession with intent to distribute subjected him to deportation, despite counsel having advised that deportation was not a substantial risk of a plea. That advice was deficient under *Padilla*. Despite sufficient evidence of guilt to result in a grand jury indictment, the Eleventh Circuit held that Hernandez demonstrated prejudice so as to warrant an evidentiary hearing. Hernandez "could have rationally chosen to risk longer incarceration for the chance to avoid deportation." *Id.* at 1234.

The cases cited by the Sixth Circuit panel in its opinion below support that court's observation that there is a "growing circuit split" over the question presented here, App. 5a, though by Mr. Lee's count that split runs 6-2 in his favor rather than dividing equally 4-4. The petition should be granted so this Court can restore uniformity among the circuits and equal treatment to all defendants in Mr. Lee's situation, regardless of the circuit in which they might be prosecuted.

II. The Court should grant the petition and reverse because it would not have been irrational for Mr. Lee to reject the plea agreement had he been properly advised of the deportation consequences.

The Circuits taking the majority position explain at great length the numerous reasons why it would have been objectively rational for Mr. Lee to reject the proffered plea deal had he known that accepting it would have resulted in his permanent deportation.

First, Mr. Lee could have attempted to negotiate for an outcome that would not have carried automatic deportation sanctions. For example, the United States Attorney's Pretrial Diversion Program is "an alternative to prosecution that diverts certain offenders from traditional criminal justice processing into a program of supervision and services" that the U.S. Probation Service administers. U.S. Attorney's Manual § 9-22.010, available at http://goo.gl/1SE27e. "In the majority of cases, offenders are diverted at the pre-charge stage," and those "who successfully complete the program will not be charged or, if charged, will have the charges against them dismissed." *Id.* Mr. Lee satisfied the eligibility criteria

for this program. *Id.* § 9-22.100 (not a case that should be diverted to the State for prosecution; no prior felony convictions; not a public official accused of violating the public trust; not accused of an offense related to national security or foreign affairs).

Mr. Lee also could have bargained for a plea to a non-aggravated felony drug or other offense. A lawful permanent resident like Mr. Lee (permanent resident for at least five years who has resided in the U.S. continuously for seven years) can apply for cancellation of removal proceedings before an immigration court, but only if he has not been convicted of an aggravated felony. 8 U.S.C. § 1229b(a). A number of the felonies listed in the Immigration and Nationality Act are "aggravated" only if the sentence exceeded one year. See 8 U.S.C. § 1101(a)(43). And Title 18 of the U.S. Code is replete with misdemeanor offenses that could be substituted for a felony controlled-substance crime.

Prosecutors will also sometimes substitute for a controlled-substance charge a misdemeanor charge under the Internal Revenue Code. Simple failure to pay any federal tax is a misdemeanor offense. 26 U.S.C. § 7203. So is failure to keep records or supply information. *Id.* Other misdemeanor offenses include providing "false or fraudulent" information in connection with withholding taxes or withheld-tax exemptions. 26 U.S.C. §§ 7204, 7205. In sum, there were ample opportunities for Mr. Lee and his attorney to negotiate for a plea agreement that would not have resulted automatically in Mr. Lee's deportation.

Second, Mr. Lee could have simply taken his chances at trial. For "the alien defendant most concerned with remaining in the United States, especially a legal permanent resident, it is not at all unreasonable to go to trial and risk a . . . sentence and guaranteed removal, but with the chance of acquittal and the right to remain in the United States." *Orocio*, 645 F.3d at 645. "[A] criminal defendant cannot be denied the right to a trial, and forced to plead guilty, because he has no sturdy legal leg to stand on but thinks he has a chance that the jury will acquit him even if it thinks he's guilty." *DeBartolo*, 790 F.3d at 779.

Third, Mr. Lee could have gone to trial hoping that, at the conclusion of his sentence, "the disarray in the enforcement of U.S. immigration law" and the "constant calls for reform of the laws themselves and of the methods of enforcing them" would result in a change in federal policy such that he would not be deported. *Id.* at 780.

Finally, it would not have been irrational for Mr. Lee to reject a plea and go to trial if the objective evidence showed that serving a lengthy sentence in the United States would keep him in close physical proximity to his family and friends, especially hi[illegible] aging parents. See *ibid.* (DeBartolo "might even have preferred a lengthy prison term in the United States to a shorter prison term that would lead more quickly to deportation, because the lengthy prison term would at least keep him in the same country as his family, facilitating frequent visits by family members, which is important to prisoners.").

These rationales for rejecting the offered plea are not after-the-fact justifications based on Mr. Lee's subjective mindset. They are all rational reasons for changing course based on the objective circumstances—circumstances that were mirrored in the many cases cited above. Moreover, allowing a defendant in Mr. Lee's position to withdraw a plea has the ameliorative effect of not placing trial-court judges in the difficult position of deciding how meritorious a defendant's defense is as part of the prejudice analysis. The petition should be granted, and this Court should adopt the analyses of the Second, Third, Fourth, Seventh, Ninth, and Eleventh Circuits.

III. The question presented is of national importance and requires prompt resolution, and this case is an ideal vehicle for resolving that question.

The numerous conflicting circuit decisions show that the issue presented is recurring and creating unnecessary district- and circuit-court litigation. The Court should grant the petition and resolve that conflict now.

First, despite this Court's decision in *Padilla*, a shocking number of lawyers fail to advise or wrongly advise their clients about the deportation consequences of a guilty plea. See generally *Immigration Law & Crimes* § 4:4 (2016). As a result, numerous circuits have been forced to address the question presented. The Sixth Circuit alone has faced the issue three times just since 2012, in *Pilla*, the present case, and in *Haddad*, 486 F. App'x. at 521–22.

Second, the circuit split is deep and mature, with six circuits on one side of the divide, two on the other. It is highly unlikely that subsequent circuit decisions or *en banc* proceedings will resolve this conflict, or provide useful additional analysis. The Sixth Circuit panel in this very case, for example, had the opportunity to join the circuit majority by advocating for *en banc* review of its decision, but instead built on and reaffirmed the *Pilla* analysis.

Third, further delay in resolving the conflict harms the government, defendants, and the justice system. If the Sixth Circuit is correct, then six other circuits have adopted the wrong rule and are needlessly undermining the immigration system by allowing noncitizen defendants to withdraw guilty pleas. If the six circuits in the majority are correct, then noncitizen defendants in the Fourth and Sixth Circuits are being unconstitutionally denied an opportunity to withdraw their pleas. Either way, the justice system is producing widely divergent results for similarly situated defendants.

Fourth, this case is an ideal vehicle to resolve the question presented. There are no contested material facts, and the United States concedes that Mr. Lee's attorney provided ineffective assistance. The sole issue left for this Court to decide is whether it is always irrational for a defendant facing strong evidence of guilt to reject a plea when a conviction will result in mandatory and permanent deportation.

Finally, this Court's intervention now is required to vindicate the Sixth Amendment's guaranty of effective assistance of counsel. This Court's review is justified if there is even a possibility lower courts are unconstitutionally denying plea withdrawals and, as a result, causing lawful permanent residents to be forever banished from the United States.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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PETITION APPENDIX TABLE OF CONTENTS

United States Court of Appeals for the Sixth Circuit, Opinion in 14-5369, Issued June 8, 2016 ..... 1a–10a

United States District Court for the Western District of Tennessee, Order Adopting in Part and Rejecting in Part Report and Recommendation, Denying Motion Pursuant to 28 U.S.C. § 2255 and Granting a Limited Certificate of Appealability in 2:10-cv-02698-JTF-dkv, Issued March 20, 2014 ..... 11a–50a

United States District Court for the Western District of Tennessee, Report and Recommendation in 2:10-cv-02698-JTF-dkv, Issued August 6, 2013 ..... 51a–77a

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UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

JAE LEE,

Petitioner-Appellant,

v. No. 14-5369

UNITED STATES OF AMERICA,

Respondent-Appellee.

Appeal from the United States District Court for the Western District of Tennessee at Memphis.

Nos. 2:09-cr-20011-1; 2:10-cv-02698—John Thomas Fowlkes, Jr., District Judge.

Argued: January 28, 2016

Decided and Filed: June 8, 2016

Before: NORRIS, BATCHELDER, and SUTTON, Circuit Judges.

COUNSEL

ARGUED: Patrick T. McNally, WEATHERLY, MCNALLY & DIXON, PLC, Nashville, Tennessee, for Appellant. Kevin P. Whitmore, UNITED STATES ATTORNEY'S OFFICE, Memphis, Tennessee, for Appellee. **ON BRIEF:** Patrick T. McNally, WEATHERLY, MCNALLY & DIXON, PLC,

Nashville, Tennessee, for Appellant. Kevin P. Whitmore, UNITED STATES ATTORNEY'S OFFICE, Memphis, Tennessee, for Appellee.

OPINION

ALICE M. BATCHELDER, Circuit Judge. Jae Lee, now 47 years old, moved to the United States from South Korea with his family in 1982 and has lived here legally ever since. After completing high school in New York, he relocated to Memphis, Tennessee, where he became a successful restaurateur. He also became a small-time drug dealer, and, in 2009, following a sting operation, he was charged with possession of ecstasy with intent to distribute in violation of 21 U.S.C. § 841(a)(1).

The case against him was very strong. A government witness was prepared to testify that he had purchased ecstasy from Lee on a number of occasions, dozens of pills were discovered during a lawful search of Lee's home, and Lee himself admitted not only that he had possessed ecstasy, but also that he had distributed the drug to his friends. In light of this, Lee's trial attorney advised him to plead guilty in exchange for a lighter sentence.

Here's the wrinkle: even though he has lived in the United States for decades, Lee, unlike his parents, never became an American citizen, and though he did eventually plead guilty, he did so only after his lawyer assured him that he would not be subject to deportation—"removal," in the argot of contemporary immigration law. This advice was wrong: possession of ecstasy with intent to distribute is an "aggravated felony," rendering Lee deportable. *See* 8

U.S.C. §§ 1101(a)(43)(B), 1227(a)(2)(A)(iii). Lee understandably does not want to be deported, and he filed a motion to vacate his conviction and sentence under 28 U.S.C. § 2255, contending that he received ineffective assistance of counsel.

We evaluate claims of ineffective assistance of counsel using the familiar two-prong test set forth in *Strickland v. Washington*, 466 U.S. 668, 687 (1984): (1) Was the attorney's performance deficient? And (2) did the deficient performance prejudice the defense? The government concedes that Lee has satisfied the first prong, so the only question we have to decide on this appeal is whether Lee has met the high bar of demonstrating prejudice. *See id.* at 693–95. To prevail, he must show "a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial." *Hill v. Lockhart*, 474 U.S. 52, 59 (1985). "The test is objective, not subjective; and thus, 'to obtain relief on this type of claim, a petitioner must convince the court that a decision to reject the plea bargain would have been rational under the circumstances.'" *Pilla v. United States*, 668 F.3d 368, 373 (6th Cir. 2012) (quoting *Padilla v. Kentucky*, 559 U.S. 356, 372 (2010)).

Whether Lee has satisfied this standard is not immediately obvious. On the one hand, the district court's conclusion that the evidence of guilt was "overwhelming" is not clearly erroneous, and deportation would have followed just as readily from a jury conviction as from a guilty plea. Thus, aside from the off chance of jury nullification or the like, Lee stood to gain nothing from going to trial but more prison time. On the other hand, for those such as Lee who have made this country their home for decades,

deportation is a very severe consequence, "the equivalent of banishment or exile," as the Supreme Court memorably put it. *Delgadillo v. Carmichael*, 332 U.S. 388, 391 (1947). As a factual matter, we do not doubt Lee's contention that many defendants in his position, had they received accurate advice from counsel, would have decided to risk a longer prison sentence in order to take their chances at trial, slim though they were.

But would such a decision be "rational"? Several courts, including this circuit, have said "no": being denied the chance to throw "a Hail Mary" at trial does not by itself amount to prejudice. *See Pilla*, 668 F.3d at 373; *Haddad v. United States*, 486 F. App'x 517, 521–22 (6th Cir. 2012); *see also, e.g.*, *Kovacs v. United States*, 744 F.3d 44, 52–53 (2d Cir. 2014); *United States v. Akinsade*, 686 F.3d 248, 255–56 (4th Cir. 2012); *United States v. Kayode*, 777 F.3d 719, 724–29 (5th Cir. 2014).

Others have reached the opposite conclusion. *See, e.g.*, *United States v. Orocio*, 645 F.3d 630, 643–46 (3d Cir. 2011), *abrogated on other grounds by Chaidez v. United States*, 133 S. Ct. 1103 (2013); *DeBartolo v. United States*, 790 F.3d 775, 777–80 (7th Cir. 2015); *United States v. Rodriguez-Vega*, 797 F.3d 781, 789–90 (9th Cir. 2015); *Hernandez v. United States*, 778 F.3d 1230, 1234 (11th Cir. 2015).

We have no ability, of course, as a panel, to change camps. And in that sense, this is a straightforward case. In *Pilla* we held that no rational defendant charged with a deportable offense and facing "overwhelming evidence" of guilt would proceed to trial rather than take a plea deal with a shorter prison sentence. 668 F.3d at 373. Lee finds himself in precisely this position, and he must therefore lose.

But given the growing circuit split (which, as best we can tell, has gone unacknowledged), we think it worthwhile to explain why we are convinced that our approach is the right one and to set out the role that we believe deportation consequences should play in evaluating prejudice under *Strickland*.

We begin, however, by giving the other side its due. As the Seventh Circuit noted in *DeBartolo*, strong evidence of guilt does not strip a defendant of his right to a jury trial, nor does it guarantee a guilty verdict. 790 F.3d at 779. The second point is especially true for defendants such as Lee, since it is well documented that many jurors are willing to acquit those charged with a first-time, non-violent drug offense, despite evidence of guilt. *See id.* (quoting Lawrence D. Bobo & Victor Thompson, *Racialized Mass Incarceration: Poverty, Prejudice, and Punishment, in Doing Race: 21 Essays for the 21st Century* 343 (Hazel R. Markus & Paula Moya eds., 2010)).

This possibility, at least according to many of this nation's founders, is not a defect, but a feature of the jury system. *See, e.g.*, 2 John Adams, *The Works of John Adams* 254–55 (1850) ("It is not only [the juror's] right, but his duty . . . to find the verdict according to his own best understanding, judgment, and conscience, though in direct opposition to the direction of the court." (Diary Entry, February 12, 1771)). Indeed, the unreviewable power of juries to acquit, despite strong evidence of guilt, was perhaps the *central* reason why the right to a jury trial in criminal cases was enshrined in the Constitution. *See* Rachel E. Barkow, *Criminal Trials, in The Heritage Guide to the Constitution* 340, 340–41 (David F. Forte & Matthew Spalding, eds. 2nd ed. 2014). For the framers and ratifiers, the memory of

how King George III had prevented colonial juries from nullifying unpopular English laws by "expand-[ing] the jurisdiction of nonjury courts" was still fresh. *Id.* at 340. And one of the grievances listed in the Declaration of Independence was that the King had "depriv[ed] us in many cases, of the benefits of Trial by Jury." *Declaration of Independence* para. 20 (U.S. 1776). It is thus not surprising that nearly all commentators active during the time of the founding favored the inclusion in the new Constitution of the right to a jury trial. *See, e.g.*, *The Federalist No. 83*, at 432–33 (Alexander Hamilton) (The Gideon ed., George W. Carey & James McClellan eds., Liberty Fund 2001) ("The friends and adversaries of the plan of the convention, if they agree in nothing else, concur at least in the value they set upon the trial by jury.").[1] By codifying the right to a jury trial in criminal cases, the Constitution secured a key role for "the People"—specifically, the people "of the State and district wherein the crime shall have been committed," U.S. Const. amend. VI—in the judicial process, providing an effective check on the ability of oppressive and distant legislators, overzealous prosecutors, and unfair judges to contravene local sentiment.

This attitude towards juries has long since fallen into disfavor, but the use of juries has not. Nor has it ceased to be true that, as G.K. Chesterton once noted, we rely on juries not because they are made up of legal experts, but precisely because they are

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[1] This high regard for juries dovetails with eighteenth-century jurists' dislike of guilty pleas. Blackstone, for example, said that courts were usually "very backward in receiving and recording" them and should usually see to it that they were withdrawn. 4 William Blackstone, *Commentaries* *329.

not. *See* G.K. Chesterton, *The Twelve Men*, *in Tremendous Trifles* 80, 86–87 (1909), *available at http://www.chesterton.org/twelve-men/*. As he put it,

> Our civilisation has decided, and very justly decided, that determining the guilt or innocence of men is a thing too important to be trusted to trained men. [When it] wishes for light upon that awful matter, it asks men who know no more law than I know, but who can feel the things that I felt in the jury box.

Id.

We nevertheless respectfully disagree with our colleagues on the Seventh Circuit that jury nullification may be considered when evaluating whether a petitioner has shown *Strickland* prejudice. We reach this conclusion for the straightforward reason that *Strickland* itself has taken the matter out of our hands: "A defendant has no entitlement to the luck of a lawless decisionmaker." 466 U.S. at 695. And we must therefore exclude from our analysis "the possibility of arbitrariness, whimsy, caprice, 'nullification,' and the like." *Id.* Such possibilities, real as they are, "are irrelevant to the prejudice inquiry" under *Strickland*. *Id.* Unfortunately for Lee, "the luck of the lawless decisionmaker" is all he has going for him. Nothing in the record suggests that he would have been acquitted at trial, *cf. Hill*, 474 U.S. at 59–60, or would have been able to obtain a conviction for an offense that did not require deportation, *cf. Missouri v. Frye*, 132 S. Ct. 1399, 1409–10 (2012); *Kovacs*, 744 F.3d at 51–52.

Similarly, while we recognize the possibility that the prosecutor might have agreed to allow Lee to

plead guilty to a non-deportable offense if his attorney had pursued the matter, this is sheer speculation. Again, there is nothing in the record before us indicating that such an attempt would have changed the ultimate outcome of Lee's case. *See Hill*, 474 U.S. at 59.

Lee, together with the courts that have reached the opposite conclusion, counters that deportation changes the calculus because "[p]reserving the client's right to remain in the United States may be more important to the client than any potential jail sentence." *Orocio*, 645 F.3d at 645 (quoting *Padilla*, 559 U.S. at 368) (internal quotation marks and emphasis omitted; brackets in original). This statement is true enough. And we agree that a "reasonable" non-citizen charged with a deportation-triggering offense will, if properly advised, consider deportation consequences in deciding whether to plead guilty and might, as a result, be willing to go to trial even if he faces a low probability of success, one that might lead a citizen to accept a plea. This consideration is thus a "special circumstance[]" relevant to the prejudice inquiry. *Hill*, 474 U.S. at 60. But it does not follow from this that a decision to reject a plea deal that would trigger deportation consequences is *ipso facto* "rational under the circumstances" regardless of the merits of the defense.

To begin with, there is no way to square such a conclusion with *Strickland*'s admonition that courts may not consider jury nullification or happenstance when deciding whether a petitioner has demonstrated prejudice. Lee's reasoning, moreover, takes the quotation from *Padilla* out of context: when *Padilla* emphasized the importance of deportation consequences to the plea calculus, it did so in the

context of analyzing the deficient-performance prong, not the prejudice prong. This is significant because the Court declined to craft a deportation-specific prejudice rule to go along with its deportation-specific performance rule. Indeed, it declined to do so even though the claimant in that case, like Lee, had lived in the United States legally for decades and had alleged that "he would have insisted on going to trial if he had not received incorrect advice from his attorney." *Padilla*, 559 U.S. at 359. While this is much the same as the statements that other courts have held sufficient to show prejudice, *see, e.g.*, *Hernandez*, 778 F.3d at 1234, the Supreme Court not only declined to decide the point, but it also emphasized "the fact that it is often quite difficult for petitioners who have acknowledged their guilt to satisfy *Strickland*'s prejudice prong." 559 U.S. at 371 n.12. The Court had no reason to say this if Lee's approach is correct.

Indeed, that approach would elide the difficult task of showing prejudice entirely since it would provide those in Lee's position with a ready-made means of vacating their convictions *whenever* they can show that counsel failed to adequately explain deportation consequences. The government may find it harder to re-prosecute (and eventually to deport) given the lapse of time, and it may have less motivation to do so since the claimant will have already served a prison sentence. This would geld the "strong presumption" against ineffective-assistance claims, *Strickland*, 466 U.S. at 696, and it is out of step with the rule that prejudice requires showing a "substantial, not just conceivable," chance of a different result, *Harrington v. Richter*, 562 U.S. 86, 112 (2011). Further, if Lee is right, might not competent defense counsel decide in some cases that acting *incompe-*

tently is better? *Cf. DeBartolo*, 790 F.3d at 780. That possibility weighs against Lee's approach, as the Supreme Court has made clear that ineffective-assistance claims must not "threaten the integrity of the very adversary process the right to counsel is meant to serve." *Harrington*, 562 U.S. at 105.

In other words, the merits matter. And we therefore join the Second, Fourth, and Fifth Circuits in holding that a claimant's ties to the United States should be taken into account in evaluating, *alongside the legal merits*, whether counsel's bad advice caused prejudice. *See, e.g.*, *Kovacs*, 744 F.3d at 52; *Akinsade*, 686 F.3d at 255–56; *Kayode*, 777 F.3d at 725. The problem for Lee is that he has no *bona fide* defense, not even a weak one. Thus, despite his very strong ties to the United States, he cannot show prejudice.

In reaching this conclusion, we should not be read as endorsing Lee's impending deportation. It is unclear to us why it is in our national interests—much less the interests of justice—to exile a productive member of our society to a country he hasn't lived in since childhood for committing a relatively small-time drug offense. But our duty is neither to prosecute nor to pardon; it is simply to say "what the law is." *Marbury v. Madison*, 5 U.S. 137, 177 (1803). Having discharged that duty, we affirm the district court's denial of Lee's § 2255 motion to vacate his conviction and sentence.

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF TENNESSEE

WESTERN DIVISION

JAE LEE, Movant, v. UNITED STATES OF AMERICA, Respondent.	)	Case No. 2:10-cv-02698-JTF-dkv Case No. 2:09-cr-20011-BBD

ORDER ADOPTING IN PART AND REJECTING IN PART REPORT AND RECOMMENDATION, DENYING MOTION PURSUANT TO 28 U.S.C. § 2255 AND GRANTING A LIMITED CERTIFICATE OF APPEALABILITY

Before the Court is the amended Motion Under 28 U.S.C. § 2255 to Vacate, Set Aside, or Correct Sentence by a Person in Federal Custody ("§ 2255 Motion") and the Report and Recommendation ("R&R") issued by United States Magistrate Judge Diane K. Vescovo (ECF No. 59). The Government filed its Objections to Report and Recommendation on August 27, 2013 (ECF No. 13), and Movant filed his Response to Government's Objections to Magistrate's Report and Recommendation on September 30, 2013 (ECF No. 68). For the reasons stated below, the Court ADOPTS the R&R in part and REJECTS it, in part, and DENIES the § 2255 Motion.

I. PROCEDURAL HISTORY

A. Case Number 09-20011

On January 28, 2009, a federal grand jury returned a single-count indictment charging Lee with possessing a mixture and substance containing a detectable amount of controlled 3,4-methylenedioxymethamphetamine, commonly known as "MDMA" and/or "ecstasy," on or about January 7, 2009, with the intent to distribute, in violation of 21 U.S.C. § 841(a)(1).[1] The factual basis for this charge is stated in the presentence report ("PSR"):

> 6. The following information was gathered from a review of materials contained in the files of the United States Attorney, including the investigative reports of the Memphis Drug Enforcement Administration (DEA) Task Force.
>
> 7. According to the investigative file, a Confidential Informant (CI) advised agents that **Jae Lee**, whom he/she had known for the last twelve years, was involved in drug trafficking since 1999. The CI indicated that between January 2001 and December 2008, the CI had purchased approximately **200 Ecstasy (MDMA) pills** from **Lee**. The CI stated that all the transactions had occurred at **Lee's** residence. The CI provided the following, which is [a] list of the years and approximate number of purchases conducted by the CI with **Lee**. No exact dates or the amounts involved are available for the trans-

[1] Indictment, United States v. Lee, No. 09-20011-BBD (W.D. Tenn.), ECF No. 1.

actions which are as follows: 5 occasions in 2001; 5 occasions in 2002; 5 occasions in 2003; 5 occasions in 2004; 7 occasions in 2005; 5 occasions in 2006; 6 occasions in 2007; and 2 occasions in 2008. The CI advised agents that he/she purchased one ounce of hydroponic marijuana from **Lee** on two occasions for $350 an ounce.

8. The CI reported to the agents that he/she owed **Lee** $150 for an existing "drug debt" for which **Lee** had "fronted" to the CI. On December 2, 2008, the CI was provided $150 in official government funds and was instructed to meet with **Lee** and settle the debt. Agents conducting surveillance observed the CI proceed to **Lee's** residence, where he/she remained for approximately ten minutes. Agents later met with the CI, who informed that while in **Lee's** residence, the CI observed **Lee** packaging 15 Ecstasy tablets into a cellophane wrapper.

9. On December 11, 2008, agents provided the CI with $300 in official government funds to conduct a buy of approximately **15 Ecstasy pills** from **Lee**. The CI was outfitted with a recording device and was under surveillance of the agents during the transaction. The CI was observed to proceed to **Lee's** residence and conduct the transaction. **Lee** indicated to the CI that he was now charging $20 a pill instead of $15. **Lee** and the CI agreed on the $20 per pill price and made the exchange. Agents later met with the CI who provided the agents with the 15 Ecstasy pills purchased from **Lee**.

10. On January 6, 2009, DEA Task Force Officers and Agents executed a federal search warrant at the residence located at 8288 George Brett Drive, Memphis, Tennessee. Agents had to make forced entry into the residence where they located **Lee** and his girlfriend, Amy Chu, in the bedroom. Agents searched **Lee's** residence and located **$32,432** in U.S. Currency located in a blue bag next to the couch; **8 Ecstasy tablets** recovered from a cigarette box located in the book case in the dining room; **80 Ecstasy tablets** found in a plastic bag in the book case in the dining room; 3 Valium tablets recovered from a box hidden underneath the bed in the master bedroom; and a loaded Norinco, Model 90, serial #616901, 7.62 caliber rifle, loaded with 25 live rounds from the master bedroom closet.

11. The drug calculations are as follows:

200 Ecstasy Tablets (purchased from the CI from January 2001 to December 2008)
15 Ecstasy Tablets (controlled purchase by the CI on December 11, 2008)
88 Ecstasy Tablets (seized on January 7, 2009 at Lee's residence)
Total = 303 Ecstasy Tablets * 250 mg = 75,750 milligrams (75.75 grams)

75.75 grams of Ecstasy * 500 grams (marijuana equivalent) = 37,875 grams
Total = 37.87 kilograms of marijuana equivalent

> 12. It should be noted that the Valium tablets and the hydroponic marijuana did not affect the guideline calculations.

(PSR ¶¶ 6-12.)

On June 17, 2009, pursuant to a written plea agreement, Lee appeared before then-United States District Judge Bernice B. Donald to plead guilty to the sole count of the Indictment.[2] The Plea Agreement did not mention that, by pleading guilty, Lee would automatically be deported after service of his sentence. It also contained the following provision:

> This writing constitutes the entire Plea Agreement between the Defendant and the Government with respect to his plea of guilty. No additional promises, representations or inducements other than those referenced in this Plea Agreement have been made to the Defendant or to his attorney with regard to this Plea, and none will be made or entered into unless in writing and signed by all parties.

(Plea Agreement ¶ 6, id., ECF No. 21.)

During the plea colloquy, the following exchange occurred:

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[2] Min. Entry, United States v. Lee, No. 09-20011-BBD (W.D. Tenn.), ECF No. 20; Mem. of Plea Agreement ("Plea Agreement"), id., ECF No. 21; Guilty Plea Hr'g Tr, id. A copy of the transcript of the change of plea hearing is Exhibit 4 to the evidentiary hearing on the § 2255 Motion and is an exhibit to the original § 2255 Motion (Case No. 10-2698, ECF No. 1-1 at PageID 94-116).

Q. And are you a U.S. citizen?

A. No, Your Honor.

Q. Okay. A conviction on this charge then could result in your being deported. It could also affect your ability to attain the status of a United States citizen. If you do become a United States citizen, it could affect your rights to participate in certain federal benefits, such as student loans.

Does that affect at all your decision about whether you want to plead guilty or not?

A. Yes, Your Honor.

Q. Okay. How does it affect your decision?

A. I don't understand.

Q. Okay. Well, knowing those things do you still want to go forward and plead guilty?

A. Yes, Your Honor.[3]

Movant testified that nobody had made any promises to him that were not in the Plea Agreement.[4] He also accepted the factual basis for the guilty plea recited by the Government, including the statement that the quantity of drugs seized was consistent with distribution rather than personal use.[5]

At a sentencing hearing on September 28, 2009, Judge Donald adopted the PSR and sentenced Lee to a term of imprisonment of twelve months and one

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[3] Guilty Plea Hr'g Tr. 9-10.

[4] Id. at 13.

[5] Id. at 17.

day, to be followed by a three-year period of supervised release. Judge Donald also imposed a fine of $5000.[6] Judge Donald emphasized that the offense was serious despite the relatively small number of pills that were involved:

> As you and your attorney and the government has all recognized, this is a very . . . serious offense, and it's one that has been ongoing for some period of time. It was not simply one aberrant act, but apparently one time getting caught.
>
> And while we, you know, the number of pills that we are looking at is just under 300. There is nothing to suggest that that's the universe of pills that were involved in this ten year period.
>
> And I think it would be fool hardy to believe that the ten year term included only the three hundred.[7]

Judgment was entered on September 29, 2009.[8] A corrected judgment, which delayed service of the

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[6] Min. Entry, United States v. Lee, No. 09-20011 (W.D. Tenn.), ECF No. 25; Sentencing Hr'g Tr., id. A copy of the sentencing transcript is an exhibit to the original § 2255 Motion (Case No. 10-2698, ECF No. 1-1 at PageID 117-37).

Pursuant to § 2K1.1(c)(11) of the United States Sentencing Guidelines ("U.S.S.G."), the base offense level for a drug offense involving between 20 and 40 kilograms of marijuana equivalent is 18. Lee received a two-level enhancement for possession of a firearm, U.S.S.G. § 2D1.1(b)(1), and a three-level reduction for acceptance of responsibility, U.S.S.G. § 3E1.1, resulting in a total offense level of 17. Given his criminal history of I, the base offense level was 24-30 months. Movant did not qualify for the safety valve reduction pursuant to U.S.S.G. § 5C1.2, which was mentioned in ¶ 1 of the Plea Agreement, because of the presence of the firearm.

[7] Sentencing Hr'g Tr. 15-16.

sentence until after January 30, 2010, was entered on October 22, 2009.[9] Lee did not take a direct appeal.

B. Procedural History of Lee's § 2255 Motion

On September 24, 2010, Lee filed a *pro se* § 2255 Motion that argued that his trial counsel, Larry Fitzgerald, rendered ineffective assistance by

1. "not only failing to inform LEE that a collateral consequence of his pleading guilty would subject him to deportation, but actually *affirmatively misadvising* him that he would not be deported if he pleaded guilty";
2. "failing to conduct any pretrial investigation into possible defenses, evidence, witnesses, discovery or search warrant deficiencies, potential lesser offense options, and/or ensuring LEE received proper consideration for the undisclosed benefits the Government received as a result of his plea"; and
3. "confusing the Court at sentencing by misrepresenting LEE was a 'citizen of the United States,' when he was not, and thus, depriving the Court of the knowledge and consideration of a factor (the consequence of deportation) that is com-

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[Footnote continued from previous page]

[8] J., United States v. Lee, No. 09-20011-BBD (W.D. Tenn.), ECF No. 26.

[9] Corrected J., id., ECF No. 29.

> monly relied upon as part of a Court's sentencing discretion."

(ECF No. 1 at PageID 34.) On October 18, 2010, Lee filed an Emergency Motion for Order to Expedite Proceedings. (ECF No. 2.) In an order issued on October 19, 2010, Judge Donald directed Lee to submit an amended motion on the official form. (ECF No. 3.)

On October 28, 2010, Lee filed his amended § 2255 Motion, which asserted the same issues that were presented in the original § 2255 Motion. (ECF No. 5.) On November 2, 2010, Judge Donald denied the Motion to Expedite and directed the Government to respond to the § 2255 Motion. (ECF No. 7.) On November 22, 2010, the Government filed its Response of the United States to Defendant's Motion to Vacate, Set Aside, or Correct Sentence Pursuant to 28 U.S.C. § 2255 ("Answer"). (ECF No. 9.) Movant filed his Reply to Response of the United States Re: Motion Pursuant [to] 28 U.S.C. § 2255 ("Reply") on December 6, 2010. (ECF No. 10.)

On November 17, 2010, Movant filed an *Emergency* Motion to Bypass Referral to Magistrate, and Order Directing Government to Provide Response Via Facsimile. (ECF No. 8.) On December 8, 2010, Movant filed an *Emergency* Motion for: (1) Setting of Evidentiary Hearing and Order to Transport *Before* January 5, 2010 or, Alternatively, for Final Ruling and COA; and (2) for Production of Search Warrant and Audio Recordings. (ECF No. 11.) In an order issued on June 3, 2011, Judge Donald, *inter alia*, denied the motion for facsimile service as moot, denied the motion for discovery as unnecessary, granted the motion for an evidentiary hearing, and referred the matter to the Magistrate Judge for possible appointment of counsel to represent Lee at

the evidentiary hearing. (ECF No. 15.) The order also notified Movant that he "can bypass [the referral to the Magistrate Judge] by promptly notifying the Court that he does not request appointed counsel." (Id. at 3.) On July 19, 2011, an attorney filed a notice of appearance on Movant's behalf. (ECF No. 18.) On October 28, 2011, Movant filed his own factual affidavit in support of his § 2255 Motion. (ECF No. 22-1.)

An evidentiary hearing was set for November 1, 2011. (ECF No. 20.) Movant filed a Motion to Reschedule Hearing (ECF No. 21), which was granted. The hearing was rescheduled for December 13, 2011. (ECF No. 23.) The Government filed a Motion to Continue Hearing and represented that "[t]he defendant's attorney has no objections to the United States' request." (ECF No. 25.) On December 9, 2011, Judge Donald granted the motion to continue.

Because Judge Donald was confirmed as a judge on the Sixth Circuit Court of Appeals, the case was reassigned to United States District Judge Samuel H. Mays, Jr. on December 29, 2011. (ECF No. 27.) On January 5, 2012, Judge Mays referred the matter to United States Magistrate Judge Diane K. Vescovo to conduct an evidentiary hearing and prepare a report and recommendation. (ECF No. 28.)[10]

Magistrate Judge Vescovo conducted an evidentiary hearing on February 9, 2012. (ECF Nos. 33 & 56.) On March 9, 2012, Movant filed his Post-Hearing Brief in Support of Motion Pursuant to 28 U.S.C. § 2255. (ECF No. 37.) In that brief, Movant

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[10] The matter was subsequently reassigned to the undersigned judge on August 3, 2012.

argued that his attorney's "performance fell below the standard articulated in Padilla v. Kentucky." (Id. at 6.)[11] On April 16, 2012, the Government filed its Response of the United States to Petitioner's Post Hearing Brief in Support of Motion Pursuant to 28 U.S.C. § 2255. (ECF No. 40.) On June 11, 2012, Judge Mays issued an order staying the case pending the Supreme Court's decision in Chaidez v. United States, 655 F.3d 684 (7th Cir. 2011), *cert. granted*, ___ U.S. ___, 132 S. Ct. 2101, 182 L. Ed. 2d 867 (2012) (No. 11-820), which was expected to address the retroactivity of Padilla. (ECF No. 46.)

On February 20, 2013, the Supreme Court issued its decision in Chaidez v. United States, ___ U.S. ___, 133 S. Ct. 1103, 185 L. Ed. 2d 149 (2013), which held that the decision in Padilla was not retroactively applicable to cases on collateral review. On March 11, 2013, the parties filed a joint motion to lift the stay (ECF No. 48), which the Court granted on March 12, 2013 (ECF No. 49). On April 20, 2013, Movant filed his Second Post-Hearing Brief in Support of Motion Pursuant to 28 U.S.C. § 2255. (ECF No. 54.) In that filing, Movant argued that his conviction should be vacated because:

> (1) trial counsel affirmatively misadvised Mr. Lee that the government was not going to seek deportation, (2) trial counsel failed to defend Mr. Lee in that he failed to seek a non-deportable disposition because he operated under the erroneous assumption that government was not going to seek deporta-

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[11] Padilla v. Ky., 559 U.S. 356, 130 S. Ct. 1473, 176 L. Ed. 2d 284 (2010).

> tion despite that deportation was mandatory upon a conviction for this drug offense, and (3) trial counsel rendered constitutionally ineffective assistance of counsel where he was not aware of the reasonably foreseeable extension of law that trial counsel must provide non-citizen clients competent advice on immigration consequences once the Supreme Court granted the writ of certiorari in Padilla.

(Id. at 2.) On June 20, 2013, the Government filed its Response to Petitioner's Second Post-Hearing Brief in Support of Motion Pursuant to 28 U.S.C. § 2255. (ECF No. 58.)

On August 6, 2013, Magistrate Judge Vescovo issued her R&R, which recommended that Movant's § 2255 Motion be granted. (ECF No. 59.) Specifically, the R&R concluded that "Fitzgerald's representation of Lee was objectively unreasonable in that he affirmatively misadvised Lee as to the immigration consequences of pleading guilty to the drug-trafficking crime for which Lee was indicted." (Id. at 27.) The R&R also found that Lee was prejudiced by his attorney's erroneous advice. Although recognizing that the standard for assessing prejudice is objective rather than subjective, the R&R found that, had Lee known that he would have been deported as a collateral consequence of his guilty plea, he would have insisted on going to trial. (Id. at 29-31.)

On August 27, 2013, the Government filed its Objections to Report and Recommendations. (ECF No. 63.) On September 30, 2013, Movant filed his Response to Government's Objections to Magistrate's Report and Recommendation. (ECF No. 68.)

II. LEGAL STANDARDS

A. Standards for Evaluating § 2255 Motions

Pursuant to 28 U.S.C. § 2255(a),

> [a] prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence.

"A prisoner seeking relief under 28 U.S.C. § 2255 must allege either (1) an error of constitutional magnitude; (2) a sentence imposed outside the statutory limits; or (3) an error of fact or law that was so fundamental as to render the entire proceeding invalid." Short v. United States, 471 F.3d 686, 691 (6th Cir. 2006) (internal quotation marks omitted).

After a § 2255 motion is filed, it is reviewed by the Court and, "[i]f it plainly appears from the motion, any attached exhibits, and the record of prior proceedings that the moving party is not entitled to relief, the judge must dismiss the motion." Rule 4(b), Rules Governing Section 2255 Proceedings for the United States District Courts ("§ 2255 Rules"). "If the motion is not dismissed, the judge must order the United States attorney to file an answer, motion, or other response within a fixed time, or to take other action the judge may order." Id. The movant is entitled to reply to the Government's response. Rule 5(d),

§ 2255 Rules. The Court may also direct the parties to provide additional information relating to the motion. Rule 7, § 2255 Rules.

"In reviewing a § 2255 motion in which a factual dispute arises, the habeas court must hold an evidentiary hearing to determine the truth of the petitioner's claims." Valentine v. United States, 488 F.3d 325, 333 (6th Cir. 2007) (internal quotation marks omitted). "[N]o hearing is required if the petitioner's allegations cannot be accepted as true because they are contradicted by the record, inherently incredible, or conclusions rather than statements of fact." Id. (internal quotation marks omitted). Movant has the burden of proving that he is entitled to relief by a preponderance of the evidence. Pough v. United States, 442 F.3d 959, 964 (6th Cir. 2006).

A claim that ineffective assistance of counsel has deprived a movant of his Sixth Amendment right to counsel is controlled by the standards stated in Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). To demonstrate deficient performance by counsel, a petitioner must demonstrate that "counsel's representation fell below an objective standard of reasonableness." Id. at 688, 104 S. Ct. at 2064. "A court considering a claim of ineffective assistance must apply a 'strong presumption' that counsel's representation was within the 'wide range' of reasonable professional assistance. [Strickland, 466 U.S.] at 689, 104 S. Ct. 2052. The challenger's burden is to show 'that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment.' Id., at 687, 104 S. Ct. 2052." Harrington v. Richter, ___ U.S. ___, ___, 131 S. Ct. 770, 787, 178 L. Ed. 2d 624 (2011).

To demonstrate prejudice, a prisoner must establish "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Strickland, 466 U.S. at 694, 104 S. Ct. at 2068.[12] "A reasonable probability is a probability sufficient to undermine confidence in the outcome." Id. at 694, 104 S. Ct. at 2068. "It is not enough 'to show that the errors had some conceivable effect on the outcome of the proceeding.' [Strickland, 466 U.S.] at 693, 104 S. Ct. 2052. Counsel's errors must be 'so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.' Id., at 687, 104 S. Ct. 2052." Richter, ___ U.S. at ___, 131 S. Ct. at 787-88; *see also* id. at ___, 131 S. Ct. at 791-72 ("In assessing prejudice under Strickland, the question is not whether a court can be certain counsel's performance had no effect on the outcome or whether it is possible a reasonable doubt might have been established if counsel acted differently. . . . The likelihood of a different result must be substantial, not just conceivable.") (citations omitted); Wong v. Belmontes, 558 U.S. 15, 27, 130 S. Ct. 383, 390-91, 175 L. Ed. 2d 328 (2009) (per curiam) ("But Strickland does not require the State to 'rule out' [a more favorable outcome] to prevail. Rather, Strickland places the burden on the defendant, not the State, to show a 'reasonable probability' that the result would have been different.").

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[12] "[A] court need not determine whether counsel's performance was deficient before examining the prejudice suffered by the defendant." Id. at 697, 104 S. Ct. at 2069. If a reviewing court finds a lack of prejudice, it need not determine whether, in fact, counsel's performance was deficient. Id. at 697, 104 S. Ct. at 2069.

The two-part test stated in Strickland applies to challenges to guilty pleas based on the ineffective assistance of counsel. Hill v. Lockhart, 474 U.S. 52, 57-58, 106 S. Ct. 366, 369-70, 88 L. Ed. 2d 203 (1985). "Where, as here, a defendant is represented by counsel during the plea process and enters his plea upon the advice of counsel, the voluntariness of the plea depends on whether counsel's advice was within the range of competence demanded of attorneys in criminal cases." Id. at 56, 106 S. Ct. at 369 (internal quotation marks omitted). "[T]o satisfy the 'prejudice' requirement, the defendant must show that there is a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial." Id. at 59, 106 S. Ct. at 370; *see also* Padilla v. Ky., 559 U.S. at 372, 130 S. Ct. at 1485 ("[T]o obtain relief on this type of claim, a [prisoner] must convince the court that a decision to reject the plea bargain would have been rational under the circumstances.").[13]

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[13] The Supreme Court emphasized that,

> [i]n many guilty plea cases, the "prejudice" inquiry will closely resemble the inquiry engaged in by courts reviewing ineffective assistance challenges to convictions obtained through a trial. For example, where the alleged error of counsel is a failure to investigate or discover potentially exculpatory evidence, the determination whether the error "prejudiced" the defendant by causing him to plead guilty rather than going to trial will depend on the likelihood that discovery of the evidence would have led counsel to change his recommendation as to the plea. This assessment, in turn, will depend in large part on a prediction whether the evidence likely would have changed the outcome of a trial. Similarly, where the alleged error of counsel is a failure to advise the defendant of a potential affirma-

[Footnote continued on next page]

"Surmounting Strickland's high bar is never an easy task." Padilla, 559 U.S. at 371, 130 S. Ct. at 1385.

> An ineffective-assistance claim can function as a way to escape rules of waiver and forfeiture and raise issues not presented at trial, and so the Strickland standard must be applied with scrupulous care, lest "intrusive post-trial inquiry" threaten the integrity of the very adversary process the right to counsel is meant to serve. Strickland, 466 U.S., at 689-690, 104 S. Ct. 2052. Even under *de novo* review, the standard for judging counsel's representation is a most deferential one. Unlike a later reviewing court, the attorney observed the relevant proceedings, knew of materials outside the record, and interacted with the client, with opposing counsel, and with the judge. It is "all too tempting" to "second-guess counsel's assistance after conviction or adverse sentence." Id., at 689, 104 S. Ct. 2052; *see also* Bell v. Cone, 535 U.S. 685, 702, 122 S. Ct. 1843, 152 L. Ed. 2d 914 (2002); Lockhart v. Fretwell, 506 U.S. 364, 372, 113 S. Ct. 838, 122 L. Ed. 2d 180 (1993). The question is whether an attorney's representation amounted to incompetence under "prevailing professional norms," not whether

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[Footnote continued from previous page]

> tive defense to the crime charged, the resolution of the "prejudice" inquiry will depend largely on whether the affirmative defense likely would have succeeded at trial.

Hill, 474 U.S. at 59, 106 S. Ct. at 370-71.

> it deviated from best practices or most common custom. Strickland, 466 U.S., at 690, 104 S. Ct. 2052.

Richter, ___ U.S. at ___, 131 S. Ct. at 788.

B. De Novo Review of a Magistrate Judge's R&R

The district court has the authority to refer certain pretrial matters to a magistrate judge for resolution. 28 U.S.C. § 636(b)(1)(A). The referral may include dispositive matters such as a motion for summary judgment or a motion for injunctive relief. 28 U.S.C. § 636(b)(1)(B). When a dispositive matter is referred, the magistrate judge's authority only extends to issuing proposed findings of fact and recommendations for disposition, which the district court may adopt or not.

The district court has appellate jurisdiction over any decision the magistrate judge issues pursuant to such a referral. 28 U.S.C. § 636(b); Fed. R. Civ. P. 72. The standard of review applied by the district court depends on the nature of the matter the magistrate judge considers. If the magistrate judge's order addresses a dispositive motion or prisoner petition, the district court should engage in *de novo* review of all portions of the order to which specific written objections have been made. 28 U.S.C. § 636(b)(1)(A); Fed. R. Civ. P. 72(b)(3); United States Fid. & Guar. Co. v. Thomas Solvent Co., 955 F.2d 1085, 1088 (6th Cir. 1992).

A *de novo* review requires the reviewing court to reconsider the matter in its entirety, without granting any weight or consideration to the lower court's decision. "The district judge may accept, reject, or modify the recommended disposition; receive further

evidence; or return the matter to the magistrate judge with instructions." Fed. R. Civ. P. 72(b)(3).

III. *DE NOVO* REVIEW OF THE R&R

A. The Proposed Findings of Fact

In its Objections to the R&R, the Government states as follows:

> The United States agrees with the Magistrate's position that the "testimonies of Lee and Fitzgerald were consistent that deportation was the determinative issue in Lee's decision whether to accept the plea deal." Lee's attorney believed that because he had lived in the country for a long time, Lee would not be deported. This is the same factual and legal error made by Padilla's attorney. The only factual disagreement with the Magistrate's Proposed Findings of Fact and Padilla's facts is that Lee's attorney also advised him that deportation was a possibility, but that the United States Attorney's Office was not seeking deportation. Nevertheless, this advice was also incorrect concerning deportation because Lee's deportation was not a possibility but automatic.

(ECF No. 63 at 15 (citations omitted).)

The R&R discussed Fitzgerald's testimony that he advised Lee that deportation was a possibility but that the United States Attorney's Office was not seeking deportation and concluded that Lee's testimony was more credible than that of Fitzgerald. (*See* ECF No. 59 at 11.) The R&R also credited the testimony of Lee that, at the guilty plea hearing, Fitzgerald assured Lee that Judge Donald's warning about the possible deportation consequence of a

guilty plea could be disregarded because it was merely a "standard warning for non-U.S. citizen[s]." (Id. at 8; *see also* id. at 11-13 (crediting Lee's testimony over that of Fitzgerald).) The Government has not objected to the factual finding of the R&R about Fitzgerald's statement to Lee during the plea colloquy. Even if Fitzgerald did, at some point during his discussions with Lee, say that deportation was a possibility, those statements were overshadowed by the assurances Fitzgerald provided Lee that he would likely not be deported as a consequence of his guilty plea.

The Court OVERRULES the Government's objection to the Factual Findings in the R&R and ADOPTS those Factual Findings.

B. The Proposed Conclusions of Law

The Government has urged the Court to reject the conclusions of law in the R&R in their entirety. (ECF No. 63 at 3-4.) The Government's objections to the R&R's analysis of the deficient performance prong of Strickland v. Washington and Hill v. Lockhart is largely repetitive of the arguments presented to the Magistrate Judge in the post-hearing briefs. (*See* ECF No. 63 at 16-20; *see also* ECF No. 58 at 7-9 (second post-hearing brief).) The Court concludes that the R&R accurately summarizes the Supreme Court's decisions in Padilla and Chaidez (ECF No. 59 at 17-21), accurately states that those decisions do not affect ineffective assistance claims based on affirmative misrepresentations (id. at 21-26), and accurately concludes that Fitzgerald's advice to Lee amounted to an affirmative misrepresentation (id. at 27-29). The Court OVERRULES the Government's objections to this aspect of the Conclusions of

Law in the R&R and ADOPTS those Conclusions of Law.

The R&R also concluded that Lee had satisfied the prejudice prong of Strickland and Hill. (Id. at 29-31.) As previously stated, *see supra* p. 12, in the guilty plea context, the prejudice prong requires the movant to show that "counsel's constitutionally ineffective performance affected the outcome of the plea process. In other words, in order to satisfy the 'prejudice' requirement, the defendant must show that there is a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and insisted on going to trial." Hill, 474 U.S. at 59, 106 S. Ct. at 370.

The Supreme Court has emphasized that, "to obtain relief on this type of claim, a [prisoner] must convince the court that a decision to reject the plea bargain would have been rational under the circumstances." Padilla, 559 U.S. at 372, 130 S. Ct. at 1485. A prisoner "cannot make that showing merely by telling [the court] now that [he] would have gone to trial then if [he] had gotten different advice. The test is objective, not subjective . . . ." Pilla v. United States, 668 F.3d 368, 373 (6th Cir. 2012). The Supreme Court also emphasized that "it is often quite difficult for petitioners who have acknowledged their guilt to satisfy Strickland's prejudice prong." Padilla, 559 U.S. at 371 n.12, 130 S. Ct. at 1485 n.12.

There is relatively little caselaw applying these standards to claims that a movant was misadvised of the deportation consequences of a guilty plea. In Pilla, the petitioner, a native of India who was an assistant professor at Case Western University, falsely reported that she had received hate mail. After an extensive investigation by the University and the

FBI, it was determined that the petitioner had sent the mail to herself. She pled guilty to making false, misleading, or fraudulent statements to the FBI, in violation of 18 U.S.C. § 1001, and was sentenced to six months in prison and ordered to pay $66,000 in restitution. Id. at 370. Petitioner's attorney encouraged her to plead guilty after learning that the evidence of her guilt was "overwhelming" and the likelihood of success on a motion to suppress was "close to zero." Id. at 370-71. Subsequently, "[a]n immigration judge determined that Pilla's offense was, in fact, an aggravated felony and that she was therefore removable under 8 U.S.C. § 1227(a)(2)(A)(iii). The Board of Immigration Appeals agreed and dismissed Pilla's appeal." Id. at 371. The Court of Appeals denied Pilla's petition for review. Pilla v. Holder, 458 F. App'x 518 (6th Cir. 2012).

Pilla challenged her guilty plea through a petition for a writ of error *coram nobis*, and the Sixth Circuit denied relief, holding that she had not established prejudice within the meaning of Strickland and Hill. Pilla v. United States, 668 F.3d at 373.[14] The Court of Appeals explained:

> As noted above, Pilla faced overwhelming evidence of her guilt, which included a video that showed her planting the letters, a CD of incriminating phone conversations, and FBI interview notes documenting her confession. Given this evidence, the district court found that Pilla "had no realistic chance of being acquitted at trial" and that, if she had pro-

[14] A writ of *coram nobis* is "an extraordinary writ sometimes available to federal convicts who have already completed their prison term." Id. at 370.

> ceeded to trial, she "had no rational defense, would have been convicted and would have faced a longer term of incarceration." Those findings were not clearly erroneous, or indeed erroneous at all. And had Pilla been convicted after trial, she would have been just as removable as she was after her guilty plea. The only consequence of Bell's inaccurate advice—assuming one believes Pilla's assertion that she would have gone to trial had she gotten accurate advice—is that she got a shorter prison term than otherwise. But more to the point, no rational defendant in Pilla's position would have proceeded to trial in this situation. Pilla therefore has not shown that Bell's advice created even a "reasonable probability" of prejudice. And thus she cannot show that Bell's advice "probably ... altered the outcome of the challenged proceeding," as required for a writ of *coram nobis*. . . .

Id.

In Haddad v. United States, 486 F. App'x 517, 518 (6th Cir. 2012), an unpublished decision addressing a petition for writ of error *coram nobis*, the petitioner, a native of Syria, pled guilty to possessing LSD in 1997, making him deportable. Relying on Pilla, the panel found that the petitioner could not establish prejudice. The panel reasoned as follows:

> Haddad therefore cannot establish prejudice merely by stating now that he would have gone to trial then if he had been told that his plea would authorize the government to deport him. Pilla, 668 F.3d at 373. "The test is objective, not subjective": to pre-

vail, "'a petitioner must convince the court that a decision to reject the plea bargain would have been rational under the circumstances.'" Id. (quoting Padilla, 130 S.Ct. at 1485). This in turn requires a "prediction of the likely outcome at trial." Dando v. Yukins, 461 F.3d 791, 798 (6th Cir. 2006); *see* Pilla, 668 F.3d at 373 (analyzing Pilla's chance of success at trial to determine whether she was prejudiced). In many cases, "this inquiry will be dispositive." Maples v. Stegall, 340 F.3d 433, 440 (6th Cir. 2003).

. . . .

The same logic [as was presented in Pilla] applies in the present case. Like Pilla, Haddad states now that he would have gone to trial if his attorney had advised him that pleading guilty would make him deportable. But this statement is not enough to establish prejudice. Id. And the evidence against Haddad is strong. He was caught red-handed: while Haddad was entering Canada from the United States, a customs agent searched Haddad and found three pieces of paper that tested positive for LSD.

Haddad also has no rational defense to the crime of possessing drugs. Before the district court, he asserted that he would have raised the following three possible defenses: the search or seizure was illegal, he did not possess the substances found during the search, and the government could not prove that those substances were actually illegal drugs. But he offers no reason to believe that these defenses had any chance of success, let

alone that they were rational. And there are good reasons for discounting each defense, which we address in turn. The Supreme Court has held that routine border searches of persons entering the country do not require reasonable suspicion, probable cause, or a warrant. United States v. Montoya de Hernandez, 473 U.S. 531, 538, 105 S. Ct. 3304, 87 L. Ed. 2d 381 (1985); *see* United States v. Flores-Montano, 541 U.S. 149, 152–55, 124 S. Ct. 1582, 158 L. Ed. 2d 311 (2004). And although this court has not specifically decided the question whether that doctrine extends to border searches of persons leaving the country, Sixth Circuit precedent suggests that the doctrine does. *See* United States v. Boumelhem, 339 F.3d 414, 420–423 (6th Cir. 2003) (holding that the doctrine extends to searches of articles leaving the country). The language Boumelhem used in a section heading supports this point: "The Border Search Exception Applies to Persons and Articles Leaving the Country, and Not Only to Those Entering the Country." Id. at 420 (emphasis added); *accord* United States v. Humphries, 308 Fed. Appx. 892, 896 (6th Cir. 2009) (citing Boumelhem for the proposition that "[w]e have extended the rational underlying the suspicionless search of persons and effects entering the country to situations where persons or articles attempt to exit the country as well" (emphasis removed)). The last two defenses—that Haddad did not possess the substances found during the search and that the government could not prove that those substances were illegal drugs—are

frivolous because Haddad was caught personally possessing a substance that tested positive for LSD, which is a controlled substance under federal law, *see* 21 U.S.C. §§ 802(6), 812 Schedule I(c)(9). The magistrate's Report and Recommendation, which the district court adopted, implicitly reached the same conclusion about the defenses that Haddad asserts he would have raised—namely, that they are not realistic.

In addition to the strong evidence against him and his lack of viable defenses, another weight tipping the scale in favor of Haddad pleading guilty is the benefit he received by doing so. He received the minimum fine ($1000) and no prison time. Had he gone to trial and been convicted, as seems highly likely, he would be just as deportable as he was after pleading guilty and he would have faced imprisonment for up to one year or a higher fine, or both, 21 U.S.C. § 844(a).

The only counterweight Haddad points to in support of his claim that he would have insisted on going to trial is the after-the-fact allegation in his affidavit; in other words, all Haddad offers to support his claim is the claim itself. Not only is that claim insufficient to show prejudice because the test is objective, *see* Pilla, 668 F.3d at 373, but the entire record goes against it. Like Pilla, Haddad faced strong evidence of his guilt, and if he had gone to trial, he had no rational defense, would have been convicted, would have faced time in prison, and would have been deportable anyway. *See* id. "[N]o

> rational defendant in [Haddad's] position would have proceeded to trial." Id. Haddad therefore cannot show the prejudice necessary for an ineffective-assistance claim. This conclusion is buttressed by the fact that Haddad does not even argue on appeal that he satisfies the prejudice prong.

Id. at 521-22.

Two district courts in this circuit have also evaluated a prisoner's claim that he would not have pled guilty if he had known that he would be deported. United States v. Chan Ho Shin, 891 F. Supp. 2d 849, 858 (N.D. Ohio 2012), involved a native of South Korea who had become a lawful permanent resident alien of the United States, raised his family in this country, and operated a successful business. He pled guilty to four counts of filing false tax returns and was sentenced to probation. Id. at 851. After the commencement of deportation proceedings, the petitioner filed a petition for a writ of error *coram nobis*. Id. The court denied relief because Shin could not establish prejudice. Id. at 857-58. The court explained:

> Even if Shin could show his counsel's performance was deficient and fell below an objective standard of reasonableness, he cannot establish that such deficiency caused him actual prejudice. Shin argues he would not have pled guilty "[h]ad [he] known or been told that [his] guilty plea in this case would lead to [his] automatic removal from the United States". According to Shin, such a blanket assertion is a "sufficient showing" under Hill. Hill, however, says the complete opposite: "[a] petitioner's allegations are insufficient to satisfy the Strickland v.

Washington requirement of 'prejudice.'" 474 U.S. at 60, 106 S. Ct. 366. Indeed, the Sixth Circuit has clarified that a petitioner cannot satisfy the prejudice element by merely telling the court that he would have gone to trial if he had received different advice. *See* Pilla, 668 F.3d at 372-73; *see also* Haddad v. United States, 2012 WL 2478355, *3-4 (6th Cir. 2012). Rather, the test is objective, and Shin must convince this Court "that a decision to reject the plea bargain would have been rational under the circumstances." Pilla, 668 F.3d at 373; *see also* Hill, 474 U.S. at 59, 106 S. Ct. 366. Shin's brief is completely silent in this regard.

Notwithstanding Shin's silence, this Court is convinced that accepting the plea was certainly a rational choice in this case. A conviction following a trial would have resulted, at a minimum, in a sentencing guidelines offense level of 14, which carries a sentencing range of 15 to 21 months imprisonment. Shin's acceptance of responsibility led to a lower guidelines range and, due in large part to his cooperation, Shin was ultimately sentenced to a term of probation. Shin offers no argument that he had a realistic chance of being acquitted at trial, and there is no evidence in the record that Shin had a rational defense to the charges.

Moreover, had Shin been convicted after a trial, he would not have eliminated, or even reduced, his chances of removal. The only consequence of his counsel's "erroneous" advice—assuming Shin's assertion that he

> would have gone to trial had he received more accurate advice—is that he received a more lenient sentence. In short, nothing leads to the conclusion that a rational defendant in Shin's position would have proceeded to trial. Shin fails to show his lawyer's advice created a "reasonable probability" of prejudice, and thus he cannot show that the advice "'probably ... altered the outcome of the challenged proceeding,' as is required for a writ of *coram nobis*." Pilla, 668 F.3d at 373 (quoting Johnson, 237 F.3d at 755).

Id. (record citations omitted).

The court briefly addressed the petitioner's personal circumstances, although not in the context of its analysis of the prejudice prong:

> On one hand, Shin's situation is lamentable. After coming to this country, Shin and his wife were able to build a successful business and raise a family here in Toledo. Shin became a lawful permanent resident and was close to attaining American citizenship. In a letter dated June 2009, his counsel confirmed that but-for his troubles with the IRS, Shin would be a U.S. citizen today. Shin was living the proverbial "American dream," but now he faces deportation.
>
> On the other hand, Shin committed a serious crime—he diverted hundreds of thousands of dollars from his business for personal use, defrauding the Government over a period of years. Had becoming an American citizen been as important to him as he contends, Shin should have avoided cheating

> and lying to the IRS. Immigration law classifies some crimes as removable offenses, and Shin's was one of them. Nothing in the record demonstrates Shin received ineffective assistance of trial counsel and, for all the reasons stated above, Shin's Petition must be denied.

Id. (record citation omitted).

Finally, United States v. Abou-Khodr, No. 99-CV-81073, 2013 WL 4670856 (E.D. Mich. Aug. 30, 2013), was a successful petition for a writ of error *coram nobis* filed by a native of Lebanon. The petitioner was "legally admitted to the United States on September 29, 1996. He is married with six children, all of whom are citizens of the United States, and he is the part-owner of a family business in this country." Id. at *1. About-Khodr pled guilty to conspiring to possess heroin with the intent to deliver based on the representations of his attorney, made after negotiations with the Government, that if he pled guilty and cooperated he would be allowed to stay in the country. Id. The Government had made a § 5K1.1 motion, which was granted, and Abou-Khodr was sentenced to a term of imprisonment of six months followed by two years of supervised release. Id. at *2. Abou-Khodr submitted an affidavit in support of his petition that stated, in pertinent part, that "because he ... was of the firm and committed belief if he ... was deported, it would be catastrophic for himself and his family, as well as the family business, he ... would rather face the prospect of a long prison term rather than be deported from this country." Id. at *6.

In finding prejudice, the Abou-Khodr court reasoned as follows:

The government relies on Haddad v. United States, 486 Fed. Appx. 517 (6th Cir. 2012), in support of its position that Abou-Khodr's petition for a writ of *coram nobis* lacks merit. Haddad is easily distinguishable. In that case, defendant filed a petition for a writ of *coram nobis* to vacate his sentence for possession of LSD on the basis that his attorney provided ineffective assistance because he failed to advice [sic] him that pleading guilty would make him deportable. Id. at 518. Unlike this case, the petitioner did not allege that his attorney affirmatively promised him that pleading guilty would allow him to stay in the country, merely that he had failed to inform him that it was a possible consequence. Also, the Sixth Circuit found that the evidence against Haddad was overwhelming where he was stopped at the border and caught red-handed with drugs on his person, and he had no viable defense. Id. at 521. Under these circumstances, the Sixth Circuit ruled that a rational person would have pleaded guilty to the offense and thus, denied the petition for the writ of *coram nobis*. Id. at 522.

In this case, by contrast, it would have been objectively reasonable for Abou-Khodr to insist on going to trial. The evidence against him was weak and circumstantial, relying primarily on his fraternal connection to his brother who was also named as a defendant. According to the government's express agreement at the August 22, 2013 status conference, Abou-Khodr's alleged involvement in the conspiracy was minor and

the quantity of drugs involved was minimal. It is the court's recollection that Abou-Khodr's alleged involvement in the conspiracy was not based in any significant respect on any criminal conduct on his part, but on his familial relationships and actions taken at the direction of his brother and others who were the culpable ones. The only conduct attributable to Abou-Khodr in the presentence investigation report is that Abou-Khodr and his brother Kalil were alleged partners of drug supplier Housam Hamdar.

Moreover, the presentence investigation report does not set forth any evidence against Abou-Khodr or describe with any particularity his alleged participation in the conspiracy. Of the thirty-eight paragraphs outlining the offense conduct of the conspiracy in that report, only three paragraphs mention Abou–Khodr at all. Paragraph 14 states, "Khodr's brother, ALI ABOU–KHODR, was also a partner of Hamdar." This is the sum total of the offense conduct attributable to Abou-Khodr in the presentence investigation report. Paragraph 30 mentions Abou-Khodr by name only, but it does not describe his alleged involvement in the conspiracy; it merely states that a search warrant was executed based on three of his brother's alleged fraudulent use of credit cards. Finally, paragraph 38 mentions that Abou-Khodr has entered into a plea agreement with the government. Based on the presentence investigation report, it appears that the government's case against Abou-

Khodr was not strong. At issue at trial would be whether he acted with guilty knowledge or simply because of his brother's request.

Abou-Khodr's ability to cooperate with the government against others of the 34 defendants named in the conspiracy, did not arise from his own criminal wrongdoing, but from his interconnections with his relatives, which in a Lebanese family are extremely close-knit. Abou-Khodr has submitted the affidavit of his defense attorney stating:

> 3. That on the basis of the aforementioned review of the government's proofs, it was and is my concrete and professional opinion that the evidence against Mr. Abou-Khodr was weak, circumstantial and "at best" ambiguous concerning the culpability of [my] client.
>
> 4. That it was and continues to be my professional conclusion my client was essentially "merely present" at various times, dates and places and appeared not to fully appreciate or be cognizant of what may have been transpiring around him.

Abou-Khodr would not have pleaded guilty but for his attorney's false guarantees that he would not be deported, and given the weak and circumstantial evidence against him, there was a likelihood of a favorable outcome should he have proceeded to trial. Accordingly, Abou-Khodr has satisfied both prongs of the Strickland test and has shown

> ineffective assistance of counsel in violation of his Sixth Amendment rights.

Id. at *7-8 (record citation omitted).

In each of the aforementioned cases, the petitioners appeared to have extensive ties to the United States. The decisions in Shin and Abou-Khodr emphasized the strength of those ties, which included lengthy residence in the United States, wives and children, and business interests. Notably, however, none of those decisions addressed the petitioner's ties to the United States in their analysis of prejudice. Instead, the only relevant factors addressed in the prejudice analysis in Pilla, Haddad and Shin were the strength of the Government's case and the benefit, in the form of a reduced sentence, the petitioner received by pleading guilty. Likewise, in granting relief in Abou-Khodr, the court emphasized the weakness of the Government's case and that petitioner was induced to plead guilty by his attorney's affirmative representation that the plea agreement would allow him to remain in the country.[15]

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[15] Abou-Khodr also appears to have involved affirmative misrepresentations by the Government. As the court explained:

> At the plea hearing, AUSA Joe Allen stated that depending on Abou–Khodr's cooperation, the government would recommend an asylum type program, if appropriate, designed to keep Abou–Khodr in the country, even though he might otherwise be subject to removal. While this court is convinced that the government's promises to assist Abou–Khodr to remain in the United States were made in good faith and without any intention to mislead, there were many alternative ways discussed between counsel in chambers conferences that the government would utilize if possi-

[Footnote continued on next page]

This case is similar to in Pilla, Haddad and Shin in that the Government's case against Lee was strong. Lee, through counsel, has accepted the Government's version of events at the guilty plea hearing and also has not objected to the factual summary in the PSR. At the evidentiary hearing, Lee's attorney testified that there did not appear to be a valid motion to suppress (Evidentiary Hr'g Tr. ("§ 2255 Hr'g Tr.") 87, Lee v. United States, No. 10-2698-JTF-dkv (W.D. Tenn.), ECF No. 56) and that the only colorable defense at trial would have been to argue that the pills that were found were intended for personal use (id. at 89-90). Based on the number of pills that were seized and the sales to the confidential informant, Fitzgerald believed that it would have been "difficult, let's put it that way, not impossible but it would [have been] difficult" to succeed at trial. (Id. at 90.) Fitzgerald testified that "I thought it was a bad case to try." (Id. at 91.) Lee's claim that he provided the pills to friends at cost also is not a viable defense to a drug trafficking charge. *See, e.g.*, United States v. Moore, 423 F. App'x 495, 500 n.2 (6th Cir. 2008) ("A defendant need not intend to *sell*

[Footnote continued from previous page]

> ble, to keep Abou–Khodr in this country. Among those alternatives were support for an asylum petition, issuance of a material witness warrant, and support for an "S" visa. Such assurances undoubtedly contributed to induce detrimental reliance by Abou–Khodr in proceeding with his plea. As explained by AUSA Lemisch at the August 22, 2013 status conference, there was never a real possibility that an "S" visa for Abou–Khodr could have been obtained.

Abou-Khodr, 2013 WL 4670856, at *1.

narcotics in order to be guilty of possession with intent to distribute.").

Lee also received tangible benefits from the plea deal. Judge Donald sentenced Lee to a term of imprisonment of one year and one day, a significant downward variance from the guideline sentencing range of twenty-four (24) to thirty-six (36) months.[16] Had Lee been sentenced after a trial, he would have lost the three-point reduction for acceptance of responsibility, leaving him with an offense level of 20. *See supra* p. 5 n.6. Given his criminal history category of I, the guideline sentencing range would have been thirty-three (33) to forty-one (41) months. Thus, the guilty plea itself appears to have greatly reduced Lee's sentence.

Although the R&R purports to apply an objective standard, its analysis of prejudice, which focuses on Lee's ties to the United States and his desire to avoid deportation, is entirely subjective. (*See* ECF No. 59 at 29-31.) The proper focus under an objective standard is on whether a reasonable defendant in Lee's situation would have accepted the plea offer and changed his plea to guilty. In light of the overwhelming evidence of Lee's guilt, a decision to take the case to trial would have almost certainly resulted in a guilty verdict, a significantly longer prison sentence, and subsequent deportation.

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[16] Judge Donald explained that she varied from the guideline range because, under the circumstance of the case, including the absence of any prior criminal history, Lee's history of gainful employment, and his drug addiction, a guideline sentence was not necessary "to get this defendant's attention and to punish." (Sentencing Hr'g Tr. 16-17.)

Lee's situation is factually similar to that of the petitioner in Shin, who had a wife and children who were United States citizens and who had established a successful business in this country. Despite those factors, the court concluded that he was unable to establish prejudice because he had no rational defense to the charges and no realistic prospect of avoiding a guilty verdict and subsequent deportation. Like Shin, Lee has no rational defense to the charge and no realistic prospect of avoiding conviction and deportation. Also like Shin, Lee may strongly prefer to remain in the United States, but a rational person in his circumstances would have accepted the plea agreement.[17]

The Court REJECTS this portion of the R&R and HOLDS that Lee has not established prejudice. Therefore, Lee is not entitled to relief on his claim that his attorney rendered ineffective assistance by affirmatively misadvising him of the deportation consequences of a guilty plea.

The two additional claims in Lee's § 2255 Motion were not addressed at the evidentiary hearing, and the R&R concluded that they have been abandoned. (*See* ECF No. 59 at 2 n.2; *see also supra* pp. 5-6 (listing the claims).) Movant has raised no objection

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[17] Although the R&R mentions the Government's concession, in its first post-hearing brief, that Lee had satisfied both elements of a Strickland claim (ECF No. 59 at 29; *see also* ECF No. 40 at 2 ("In light of the testimony during the hearing, the United States concedes the petitioner's attorney was deficient in performance and that deficiency prejudiced the petitioner.")), the weight given that factor in the R&R is unclear. The Court gives this factor no weight in light of the evolving positions of both parties in this litigation and the absence of any detrimental reliance by Movant.

to that finding and, therefore, the Court ADOPTS this portion of the R&R and DISMISSES Movant's remaining claims.[18]

The § 2255 Motion is DENIED. Judgment shall be entered for the United States.

IV. APPEAL ISSUES

Twenty-eight U.S.C. § 2253(a) requires the district court to evaluate the appealability of its decision denying a § 2255 motion and to issue a certificate of appealability ("COA") "only if the applicant has made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2); *see also* Fed. R. App. P. 22(b). No § 2255 movant may appeal without this certificate.

The COA must indicate the specific issue(s) that satisfy the required showing. 28 U.S.C. §§ 2253(c)(2) & (3). A "substantial showing" is made when the movant demonstrates that "reasonable jurists could debate whether (or, for that matter, agree that) the petition should have been resolved in a different manner or that the issues presented were adequate

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[18] In his Second Post-Hearing Brief, Movant purported to raise two additional ineffective assistance claims, namely, that his attorney failed to seek a non-deportable disposition and that he was unaware of the reasonably foreseeable extension of law once the Supreme Court granted certiorari in Padilla. (ECF No. 54 at 2; *see supra* pp. 8-9.) Movant has presented no evidence, and made no argument, that a non-deportable disposition was reasonably likely under the facts of the case. (*See* ECF No. 54 at 8-9.) Even if it were assumed that Padilla was a reasonably foreseeable extension of the law, Movant cannot show prejudice for the reasons previously stated. Therefore, the two issues presented in Movant's Second Post-Hearing Brief to the Magistrate Judge are without merit.

to deserve encouragement to proceed further." Miller-El v. Cockrell, 537 U.S. 322, 336, 123 S. Ct. 1029, 1039, 154 L. Ed. 2d 931 (2003) (internal quotation marks and citation omitted); *see also* Henley v. Bell, 308 F. App'x 989, 990 (6th Cir. 2009) (per curiam) (same). A COA does not require a showing that the appeal will succeed. Miller-El, 537 U.S. at 337, 123 S. Ct. at 1039; Caldwell v. Lewis, 414 F. App'x 809, 814-15 (6th Cir. 2011). Courts should not issue a COA as a matter of course. Bradley v. Birkett, 156 F. App'x 771, 773 (6th Cir. 2005).

In this case, reasonable jurists could disagree about the resolution of Claim 1 of Movant's § 2255 Motion, that trial counsel affirmatively misadvised him about the deportation consequences of a guilty plea. The Court GRANTS a certificate of appealability on that claim.

Rule 24(a)(1) of the Federal Rules of Appellate Procedure provides that a party seeking pauper status on appeal must first file a motion in the district court, along with a supporting affidavit. However, if the district court certifies that an appeal would not be taken in good faith, or otherwise denies leave to appeal *in forma pauperis*, the prisoner must file his motion to proceed *in forma pauperis* in the appellate court. *See* Fed. R. App. P. 24(a) (4)-(5). The Court CERTIFIES, pursuant to Rule 24(a), that an appeal in this matter on Claim 1 would be taken in good faith.[19]

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[19] Any motion for leave to proceed *in forma pauperis* on appeal must comply with Rule 24(a)(5) and must be filed within 30 days of the date of entry of this order.

IT IS SO ORDERED this 20th day of March, 2014.

BY THE COURT:

s/John T. Fowlkes, Jr.
JOHN T. FOWLKES, JR.
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION

UNITED STATES OF AMERICA, Plaintiff/Respondent.	)	Civ. No. 10-02698-JTF-dkv
vs.	)	Crim. No. 09-20011
JAE LEE, Defendant/Petitioner.	)	

REPORT AND RECOMMENDATION

On September 28, 2009, the petitioner, Jae Lee ("Lee), was sentenced to a term of imprisonment of twelve months and one day plus three years supervised release for one count of unlawful possession with intent to distribute MDMA (ecstasy) in violation of 21 U.S.C. § 841(a)(1), which is an aggravated felony. Lee pled guilty to the charge on June 17, 2009. Now before this court is Lee's motion to vacate, set aside, or correct his sentence pursuant to 28 U.S.C. § 2255,[1] filed *pro se* on September 24, 2010, in

[1] Section 2255, entitled "Federal custody; remedies on motion attacking sentence," states in part:

> A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States . . . may move the court which imposed the sentences to vacate, set aside or correct the sentence.

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which Lee alleges that his guilty plea, sentence, and conviction were rendered in violation of his Sixth Amendment guarantee to effective assistance of counsel. (Motion, D.E. 1.) The motion was referred to the United States Magistrate Judge for an evidentiary hearing and a report and recommendation. (Order of Reference, D.E. 28.)

In his motion, Lee argues that the performance of attorney Larry E. Fitzgerald ("Fitzgerald"), who represented Lee throughout the criminal proceedings, was constitutionally deficient in three regards: (1) Fitzgerald failed to advise Lee that a collateral consequence of pleading guilty would be that Lee would be deported, and in fact affirmatively misadvised Lee that he would *not* be deported if he pled guilty; (2) he failed to adequately investigate Lee's "case, possible defenses, witnesses, or discovery" in order to properly assess the advisability of proceeding to trial; and (3) he misrepresented to the court at Lee's sentencing that Lee was a United States citizen, when in fact Lee was a lawful permanent resident of the United States and has not yet obtained citizenship in this country.[2]

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28 U.S.C. § 2255(a).

[2] Only the first of these three claims was discussed at the evidentiary hearing or in post-hearing briefs. Indeed, Lee's first post-hearing brief states, "While Mr. Lee has raised numerous grounds of ineffective assistance of counsel . . . in his original § 2255 Motion . . . and Amended Motion . . . , the crux of the argument is that trial counsel's performance fell below the standard articulated in *Padilla v.* Kentucky . . . ." (Lee's First Post-Hearing Brief, D.E. 37 at 6.) For these reasons, the court presumes that Lee has abandoned the latter two of these claims, and this report and recommendation will address only the first

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At the evidentiary hearing, held February 9, 2012, the government called Fitzgerald as a witness. Lee took the stand and testified on his own behalf but called no other witnesses.[3] Lee was represented at the hearing by counsel. Based on the evidence presented at the hearing, arguments of counsel, and briefs of the parties, including two sets of post-hearing briefs, the court proposes the following findings of fact and conclusions of law and recommends that Lee's motion be granted.

I. PROPOSED FINDINGS OF FACT

In early January 2009, law enforcement officers obtained a federal search warrant for Lee's residence based on information provided to them by and collected from a confidential informant. The search was executed on January 6, 2009, and officers recovered approximately eighty-eight ecstasy pills from inside the residence. On January 28, 2009, Lee was charged in an indictment with possessing with the intent to distribute the substance MDMA (ecstasy) in violation of 21 U.S.C. § 841(a)(1). Soon after being served with the indictment, Lee retained Fitzgerald to represent him, and on January 30, 2009, Fitzgerald appeared

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claim. Regardless, Lee's claim concerning Fitzgerald's incorrect statement at sentencing regarding Lee's citizenship was harmless because Lee correctly informed the sentencing judge he was *not* a citizen of the United States, and no prejudice to Lee resulted from Fitzgerald's statement.

[3] At the time of the hearing, Lee was in the custody of ICE at a federal detention center in Louisiana. He was transported to Memphis, Tennessee, to attend the hearing pursuant to a writ of habeas corpus ad testificandum, issued by the court, commanding his appearance. (Writ, D.E. 30.)

on Lee's behalf at the initial appearance. Lee initially pled not guilty to the charge in the indictment.

At the evidentiary hearing, Fitzgerald testified that he has been practicing predominately criminal law for twenty-seven years and has represented clients in at least one-hundred trials. He testified that in his assessment, Lee's was "a bad case to try" because, among other reasons, there was no basis for attacking the search of Lee's residence, and the number of pills recovered together with Lee's alleged sale of the drug to a confidential informant severely undermined any possible defense that the drugs were for personal use and not for distribution.

Lee is a lawful permanent resident of the United States who came here as a child from Korea in 1982. He was educated in the United States and since arriving here has never returned to Korea. For over twenty years, he has lived in Memphis, Tennessee, where he owns and operates two restaurants. His mother and father, who have obtained American citizenship, reside in Brooklyn, New York. They are elderly, and Lee is, according to his testimony, "the only child left to take care of them." (Hearing Transcript, D.E. 56 at 28.)

In discussing his options in the case with Fitzgerald, Lee repeatedly raised the question of deportation and indicated that it was his main concern in deciding how to proceed. Fitzgerald testified that he does not and has never practiced immigration law and was not aware of the fact that a guilty plea to a violation of 21 U.S.C. § 841(a)(1), the charge named in the indictment against Lee, would result in mandatory, automatic deportation. Fitzgerald did not consult with an immigration lawyer about Lee's

case nor did he refer Lee to an immigration lawyer for assistance.

Fitzgerald and Lee participated with the government in a proffer session in February 2009. There was apparently a plea agreement in consideration in which, in exchange for a plea of guilty, the government would agree to deduct three points for acceptance of responsibility, reducing Lee's offense level to 17, and would be complicit with the applicability of the statutory safety valve to Lee's sentence. Following the proffer session, Fitzgerald discussed with Lee the risk of going to trial versus the benefits of pleading guilty. Fitzgerald advised Lee that he would likely face between three and five years of imprisonment if he went to trial and were convicted whereas if he accepted the plea agreement he would be looking at a much shorter term of imprisonment or possibly even just probation. As to deportation, Fitzgerald represented to Lee that "the government" was not seeking to deport Lee as part of the proposed plea agreement. At the evidentiary hearing, Fitzgerald testified that by "the government" he meant the United States Attorney's Office. Lee, however, interpreted "the government" to mean the United States government in whole. Lee did not understand that the United States Attorney's Office operates separately and apart from the Department of Homeland Security nor that the latter (through its agencies) alone is authorized to and tasked with instituting removal (deportation) proceedings.[4] Fitzgerald testi-

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[4] References to the entity "INS" are scattered throughout the parties' briefs as well as the arguments and testimony presented at the hearing. INS, or the United States Immigration and Naturalization Service, is a now-defunct federal agency

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fied that he also told Lee that he "did not know what immigration would do." Lee, however, testified that Fitzgerald specifically advised him, "[Y]ou have been in the United States so long they cannot deport you. Even if they want to deport you, it's not in the plea agreement, the government cannot deport you." (Hearing Transcript, D.E. 56 at 26.) The testimonies of Lee and Fitzgerald were consistent that deportation was the determinative issue in Lee's decision whether to accept the plea deal.

Ultimately, Lee accepted the plea deal and changed his plea to guilty on June 17, 2009. Fitzgerald testified that Lee believed he would not be deported if he pled guilty and that this belief was "the key to [Lee's] decision" to plead guilty. Fitzgerald further testified that had Lee known he would be deported for pleading guilty, it is probable Lee would have chosen to proceed to trial and indeed Fitzgerald would have advised him to do so. Lee, too, testified that he absolutely would have accepted the risk of litigation had he known that deportation was a consequence of his guilty plea.

At Lee's change-of-plea hearing, the district judge, prior to accepting Lee's guilty plea, inquired whether Lee was a United States citizen. Lee replied

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within the Department of Justice that was, up until 2003, charged with administering and enforcing immigration and naturalization laws in the United States. As of March 1, 2003, INS ceases to exist, and the majority of all former INS functions now belong to three sub-entities, one of which is ICE, within the newly created Department of Homeland Security ("DHS"). As such, this court will presume that all references to INS are intended as references to a relevant DHS agency.

that he was not a citizen. The judge then informed Lee that deportation and ineligibility for American citizenship were two possible consequences of his guilty plea and asked him if that reality in any way affected his decision to plead guilty. Lee responded in the affirmative. The judge then asked Lee to explain *how* the potentiality of the two immigration-related consequences affected his decision. Lee responded, "I don't understand." The judge then asked, "Well, knowing those things do you still want to go forward and plead guilty?" Lee responded again in the affirmative.

At the evidentiary hearing in the instant case, Lee testified that he initially expressed confusion at his change-of-plea hearing after the judge mentioned the possibility of deportation because Fitzgerald had previously advised him he would not be deported. According to Lee, though, after he told the judge "I don't understand," Lee looked up at Fitzgerald for guidance, and Fitzgerald, in a whisper, assured Lee that he could disregard the judge's deportation warning as it was merely a "standard warning for non-U.S. citizen[s]." Fitzgerald confirmed that he and Lee conferred for a few seconds at that moment in the change-of-plea hearing, but he denies instructing Lee to disregard the judge's immigration-related warnings. Fitzgerald testified, "I think I might have told him [at that point] . . . the same thing I'[d] been telling him the whole time," that "the government" was not seeking deportation but that "I [could not] tell him what's going to happen later." (*See* Hearing Transcript, D.E. 56 at 99.)

The court accepted Lee's guilty plea. On September 28, 2009, the court sentenced Lee to a period of incarceration of twelve months and one day. A judg-

ment to that effect was entered on September 29, 2009. Pursuant to order of the court, Lee self-surrendered to the United States Marshal on February 1, 2010, whereupon he was informed that the Bureau of Prisons had designated the Adams County Correctional Center ("ACCC") in Mississippi as the place for Lee to serve his sentence.

Upon arriving at ACCC, Lee learned that this particular correctional facility was a "special institution" that "*exclusively* housed federal inmates" who were facing deportation upon completion of their sentences. (*See* Motion, D.E. 1 at 31 (emphasis in original).) Soon thereafter, Lee's case manager at ACCC informed him that his 21 U.S.C. § 841(a)(1) conviction had rendered him deportable and that the institution of removal proceedings against him was imminent. Lee contacted Fitzgerald about his predicament and requested from Fitzgerald a letter "confirming the Government had agreed not to deport him, as well as that such was the advice Fitzgerald had given him." (*See id.*) Fitzgerald assented and wrote the following in a letter that he signed and addressed to "Whom It May Concern":

> There was never any discussion of deportation during the negotiation of the Plea Agreement or during Sentencing. It was my understanding that the Government was not seeking Deportation of Mr. Jae Lee.
>
> Please feel free to contact me at my office if needed for further discussion concerning this matter.

(Hearing Ex. 1.) On September 24, 2010, Lee filed *pro se* the instant motion for habeas relief under 28

U.S.C. § 2255 arguing ineffective assistance of counsel.[5]

After completion of his criminal sentence, specifically on December 8, 2010, Lee was transferred into the custody of the United States Immigration and Customs Enforcement (ICE). It is unclear when removal proceedings were instituted against Lee. He only testified that he was ordered removed from the country in August 2011 and is currently (or was at the time of the hearing) being detained at the Oakdale Federal Detention Center in Oakdale, Louisiana, pending resolution of his habeas petition.

The testimonies of the witnesses at the evidentiary hearing were largely credible and consistent with one another. The only discrepancies between the respective accounts of Lee and Fitzgerald were with respect to (1) whether Fitzgerald qualified his repeated statements to Lee that "the government" was not seeking deportation with the caveat that deportation was nonetheless a potential consequence of the guilty plea as he (Fitzgerald) did not know "what immigration would do;" and (2) whether Fitzgerald instructed Lee to disregard as merely a "standard warning" the statement of the judge at Lee's change-of-plea hearing that his plea might result in deportation. As to both of these factual disputes, the court finds the testimony of Lee to be more credible than that of Fitzgerald.

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[5] On July 19, 2011, attorney Patrick McNally entered an appearance on behalf of Lee in this habeas action. (*See* Notice of Appearance, D.E. 18.) Thus and thereafter, Lee no longer proceeds *pro se*.

With regard to the first dispute, the content of the letter that Fitzgerald wrote and signed on Lee's behalf (*see* Hearing Ex. 1) contradicts Fitzgerald's testimony at the hearing. In the letter, Fitzgerald declared that it was *his own* understanding that "the Government was not seeking Deportation of [Lee]." This suggests that, in advising Lee on the guilty plea, Fitzgerald either (1) was not himself aware that the decision whether to institute removal proceedings against an alien was not one made by the United States Attorney's Office or (2) appreciated the distinction between the governmental entities and their respective functions but nonetheless believed that the absence of any mention of deportation (removal) in the criminal plea agreement necessarily suggested that deportation would not result from the guilty plea. Either scenario indicates that Fitzgerald was not aware, much less did he impart to Lee, the potentiality that some federal governmental entity distinct from the United States Attorney's Office might later decide to deport Lee as a result of his guilty-plea conviction. The court therefore credits Lee's account of his and Fitzgerald's conversations regarding the risk of deportation and finds as fact that there was no discussion of any uncertainty as to "what immigration might do."

As to the second dispute, Lee recounted verbatim the short colloquy at the change-of-plea hearing between him and Fitzgerald concerning the judge's deportation warning. In contrast, Fitzgerald, while acknowledging the conversation occurred, was only able to testify as to what he "thinks" he "might have said" to Lee during it. Furthermore, the fact that Lee went from being confused at the change-of-plea hearing before conferring with Fitzgerald to then afterward expressing certainty that despite the

judge's warnings about any immigration-related consequences he nonetheless wished to proceed with changing his plea, indicates that whatever Fitzgerald said to Lee in the interim must have provided adequate assurance to Lee that in spite of what the judge had said, he would not be deported if he pled guilty. This is especially likely to be true considering the undisputed fact that had Lee at all been aware that deportation was possible as a result of his guilty plea, he would have not have pled guilty. By Lee's account of his and Fitzgerald's short colloquy, Fitzgerald indeed provided the assurance Lee needed to proceed with his change of plea. However, by Fitzgerald's account, there would have been no such assurance because the statements he claims he made to Lee at that time left open the possibility that deportation might result at some point in the future. If in fact Fitzgerald had made such statements, the court finds it unlikely Lee would have immediately thereafter expressed an intent to proceed with entering a plea of guilty. For all these reasons, the court credits the testimony of Lee on this matter.

There was discussion at the evidentiary hearing as to the effect, if any, on Lee's case of the United States Supreme Court's decision in *Padilla v. Kentucky*, 559 U.S. 356, 130 S. Ct. 1473 (2010), a section 2254 case in which the petitioner sought to set aside his guilty plea because his attorney had not informed him of the collateral consequence of deportation. The Supreme Court granted certiorari in that case on February 23, 2009, to determine "whether, as a matter of federal law, Padilla's counsel had an obligation to advise him that the offense to which he was pleading guilty would result in his removal from this country," *Padilla*, 130 S. Ct. at 1478. *See Padilla v. Kentucky*, 555 U.S. 1169, 129 S. Ct. 1317

(2009)(granting certiorari as to 253 S.W. 3d 482 (Ky. 2008)). Approximately four months after the Supreme Court granted certiorari but before it issued a decision in *Padilla*, Lee entered his guilty plea. A judgment of conviction was entered on September 29, 2009, and Lee had fourteen days to file a notice of appeal. Lee did not file an appeal within fourteen days, and thus his conviction became final on October 13, 2009. A little over five months later, on March 31, 2010, the Supreme Court decided *Padilla*, holding that the Sixth Amendment's right to effective assistance of counsel requires an attorney for a criminal defendant to advise his client of any deportation risk that arises from a guilty plea. *Padilla*, 130 S. Ct. at 1486. In the instant motion of Lee, filed almost six months after the decision in *Padilla*, Lee relies heavily on *Padilla* in arguing that his guilty plea should be set aside and his conviction vacated based on the ineffective assistance of his counsel Fitzgerald. The government, in its response, argued that *Padilla*'s holding should not be applied retroactively to Lee's case.

As of the time of the February 9, 2012 evidentiary hearing in this case, there was a split among the circuits as to whether *Padilla* applied retroactively, and the Sixth Circuit had not weighed in on the issue. At the conclusion of the evidentiary hearing, the court ordered the parties to submit post-hearing briefs specifically addressing, *inter alia*, the applicability (or not) of *Padilla*. Lee filed his post-hearing brief on March 9, 2012, (Lee's First Post-Hearing Brief, D.E. 37), and the government filed its response brief on April 16, 2012, (Gov.'s Resp. to

Lee's First Post-Hearing Brief, D.E. 40).[6] Then, on April 30, 2012, the United States Supreme Court granted certiorari in the case of *Chaidez v. United States* to decide the issue of "whether *Padilla* applies to persons whose convictions became final before its announcement." *Chaidez v. United States*, 132 S. Ct. 2101 3335 (2012)(granting certiorari as to 655 F.3d 684 (7th Cir. 2011)). In light of this development, the court entered an order staying the case until the Supreme Court decided *Chaidez*. (Order Staying Case, D.E. 46.)

On February 20, 2013, the Supreme Court announced its decision in *Chaidez*, holding that *Padilla* did not apply retroactively to cases on collateral review. *See Chaidez v. United States*, 133 S. Ct. 1103, 1113 (2013). Shortly thereafter, the stay on proceedings in this case was lifted and the parties were instructed to submit another set of briefs, this time addressing their positions in light of the decision in *Chaidez*. Lee filed his (second post-hearing) brief on April 20, 2013, (Lee's Second Post-Hearing Brief, D.E. 54), and the government filed its response brief on June 20, 2013, (Gov's Resp. to Lee's Second Post-Hearing Brief, D.E. 58). Lee has remained housed at the federal detention facility in Mason, Tennessee, since his February 9, 2012 evidentiary hearing.

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[6] Interestingly, in its brief, the government conceded "that the petitioner's attorney was deficient in performance and that deficiency prejudiced the petitioner," (Gov.'s Resp. to Lee's First Post-Hearing Brief, D.E. 40 at 2), but nonetheless argued that Lee was not entitled to section 2255 relief because *Padilla* did not apply retroactively to his case.

II. PROPOSED CONCLUSIONS OF LAW

In his latest brief, Lee acknowledges that the *Chaidez* decision forecloses his ability to rely on *Padilla* to support a claim that Fitzgerald's mere failure to advise him of the mandatory immigration consequences of his plea was ineffective assistance of counsel under the Sixth Amendment. (Lee's Second Post-Hearing Brief, D.E. 54 at 1-2.) However, Lee contends that his guilty plea should nonetheless be set aside and his conviction vacated, even without the benefit of *Padilla*, because it has long been and remains the law, unaltered by *Padilla*, that an attorney's actual *mis*advice to his client regarding plea consequences, including deportation, is objectively unreasonable representation for purposes of an ineffective-assistance-of-counsel claim. (*Id.* at 4-5.) Finishing out that argument, Lee suggests that Fitzgerald did not merely fail to advise him of the immigration consequences of his plea but that in fact Fitzgerald affirmatively represented to him material yet erroneous information regarding those consequences.[7] (*Id.* at 6.)

In response, the government argues that *Chaidez* forecloses Lee's claim "that his attorney provided ineffective assistance by misadvising him of the deportation consequences of his guilty plea" because that claim, the same as the failure-to-inform claim,

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[7] Also in his brief, Lee argues for the first time two additional instances of ineffective assistance of counsel: (1) Fitzgerald's failure to defend Lee by failing to seek a nondeportable disposition and (2) Fitzgerald's failure to be aware of and strategize for a reasonably foreseeable extension of law in *Padilla*. Because this court finds that Lee is entitled to relief under his affirmative misadvice claim, it will not address these other two claims.

"only became viable after *Padilla*." (Gov.'s Resp. to Lee's Second Post-Hearing Brief, D.E. 58 at 7.) The government asserts that the law in place at the time of Lee's conviction was not as Lee states. (*Id.* at 9.) Instead, according to the government, the ineffective-assistance-of-counsel claims (in this context) that were recognized at the time of Lee's conviction involved attorneys who "took an active role in handling the immigration issue" and "engage[d] in *multiple* misrepresentations thereby overstating [the attorney's] knowledge and expertise concerning immigration issues." (*Id.* (emphasis added).) The government insists that only since *Padilla* has it been the law that an attorney acting as Fitzgerald did in this case is constitutionally deficient in performance. (*Id.*)

A. The Scope of *Padilla/Chaidez*

Lee's ineffective-assistance-of-counsel claim is viable only if and to the extent it does not rely on the *Padilla* holding which, per *Chaidez*, cannot apply to Lee's benefit because his conviction became final before the case was decided. It is therefore necessary to examine *Padilla* to determine the precise contours of the new rule that was announced in that case to then decide whether Lee's claim has support independent of that rule.

The facts at issue in *Padilla* were similar to the ones in this case: Padilla alleged that his counsel not only failed to advise him his guilty plea would result in deportation but also represented to him that he "did not have to worry about immigration status since he had been in the country so long." *Padilla*, 130 S. Ct. 1478 (citation and internal quotation marks omitted). *Padilla*'s famous and oft-cited holding, however, does not speak directly to affirmative misadvice such as is claimed here and arguably was

claimed in *Padilla*. Rather, the proposition for which *Padilla* stands is that the Sixth Amendment requires an attorney to inform his criminal-defendant client about the risk of deportation flowing from a guilty plea. *Id.* at 1486.

That is not to say that the concept of affirmative misadvice was altogether ignored in the *Padilla* opinion. To the contrary, in reaching its holding, the *Padilla* Court considered and rejected the suggestion of the United States (acting as *amicus curiae*) that the Court announce a rule limited to affirmative misadvice. *Id.* at 1484. The United States had insisted that "counsel is not constitutionally required to provide advice on matters that will not be decided in the criminal case" but "is required to provide accurate advice if she chooses to discusses [sic] these matters." *Id.* (citation and internal quotation marks omitted). The Court acknowledged that there were some lower court decisions "isolating an affirmative misadvice claim"[8] but declined to follow their approach, stating "there is no relevant difference between an act of commission and an act of omission in this context." *Id.* (citation and internal quotation marks omitted).

As stated before, the Supreme Court in *Chaidez* held that *Padilla* announced a new rule of law that does not apply retroactively. *Chaidez*, 133 S. Ct. at 1113. Unlike Lee's claim, however, the claim of the petitioner in *Chaidez* was based solely on her counsel's failure to inform her that her guilty plea (to mail fraud) carried the risk of deportation. There

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[8] The Court cited, as examples, *United States v. Kwan*, 407 F.3d 1005 (9th Cir. 2005), *United States v. Couto*, 311 F.3d 179, 188 (2nd Cir. 2002), and *Sparks v. Sowders*, 852 F.2d 882 (6th Cir. 1988), among others.

was no claim that Chaidez's attorney affirmatively *mis*informed her as to that consequence. The Court noted as much in rejecting Chaidez's argument that the fact that some pre-*Padilla* lower-court cases recognized affirmative misadvice on immigration consequences as a basis for an ineffective-assistance-of-counsel claim proved that *Padilla* did not announce a new rule. *Id.* at 1112. This "separate rule for material misrepresentations," stated the Court, did not apply to Chaidez's case. *Id.* Plus, it did not support Chaidez's position that "all reasonable judges, prior to *Padilla*, thought they were living in a *Padilla*-like world" because in fact pre-*Padilla* it was almost universally held, even in those jurisdictions that recognized the "separate rule for material misrepresentations," that a defendant need not be advised of the deportation consequences of a guilty plea. *Id.; see also United States v. Chapa*, 800 F. Supp. 2d 1216, 1222 (N.D. Ga. 2011)(stating that, prior to *Padilla*, *Padilla*'s "conclusion had been rejected by . . . virtually every . . . court to address the issue"). *Padilla* completely altered that landscape by announcing that such advice was in fact required. Therefore, the *Chaidez* Court concluded, *Padilla* broke new ground, and defendants whose convictions became final prior to *Padilla* could not rely on the "new rule" from that case.

The "new rule" identified by the Court in *Chaidez* as having been announced in *Padilla* is one that speaks to the attorney's obligation to act (specifically, to advise). However, if, as Lee suggests, there was a rule in place at the time of his conviction that spoke not to the obligation to act, but rather to the obligation to, once choosing to act, do so competently by rendering accurate advice then, according to the Court's opinion in *Chaidez*, that rule is "separate"

from and undisturbed by the *Padilla* rule.[9] Such a "separate rule" lives in harmony with a pre-*Padilla* and post-*Padilla* world. Now, instead of limiting ineffective-assistance claims in this context to cases of affirmative misadvice, courts post-*Padilla* recognize such claims based on failure to advise as well. Thus, to the extent Lee's claim relies on a "separate rule" for affirmative misadvice in place at the time of his conviction, the fact that *Padilla* is not retroactive is inconsequential to Lee's case. *Cf. Silent v. United States*, No. 11-cv-5359(CBA), 2012 WL 4328386, at *5 & n.6 (E.D.N.Y. Sept. 19, 2012)(declining to stay a habeas petition pending the decision in *Chaidez* because petitioner's claim did "not turn on the distinction between failure to inform and affirmative misrepresentation," but instead depended on whether in fact there had been an affirmative misrepresentation).

B. Lee's Claim under the Law As It Existed before *Padilla*

Lee contends that the law in place at the time of his conviction was that erroneous advice concerning the risk of deportation form pleading guilty could constitute ineffective assistance of counsel. "True

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[9] Indeed, in the time since *Padilla* was decided, courts have continued to apply the "separate" affirmative misadvice rule to pre-*Padilla* convictions. *See, e.g., United States v. Pope*, No. 13 CV 598(RTD), 2013 WL 1463038, at *1 (E.D.N.Y. Apr. 12, 2013) (stating that the Second Circuit's affirmative misrepresentation rule is good law post-*Padilla* and –*Chaidez*); *Kovacs v. United States*, No. CV-12-2260(LDW), 2013 WL 55823 (E.D.N.Y. Jan. 2, 2013)(applying to a 1999 guilty plea the Second Circuit's pre-*Padilla* affirmative misadvice rule as if unaffected by *Padilla*); *United States v. Chapa*, 800 F. Supp. 2d 1216, 1224-25 (N.D. Ga. 2011).

enough, three federal circuits (and a handful of state courts) held before *Padilla* that misstatements about deportation could support an ineffective assistance claim." *Chaidez*, 133 S. Ct. at 1112 & 1111 n.12 (citing *United States v. Kwan*, 407 F.3d 1005, 1015-17 (9th Cir. 2005); *United States v. Couto*, 311 F.3d 179, 188 (2nd Cir. 2002); *Downs-Morgan v. United States*, 765 F.2d 1534, 1540-41 (11th Cir. 1985)). The government argues that these cases are distinguishable because they involved multiple misrepresentations from attorneys who misled their clients as to the attorneys' expertise in immigration law.

In *United States v. Kwan*, 407 F.3d 1105 (9th Cir. 2005), the petitioner filed a petition collaterally attacking his conviction by guilty plea to bank fraud. Prior to the plea, Kwan's attorney had advised him that although pleading guilty could technically result in deportation, "it was not a serious possibility," "based on [the attorney's] knowledge and experience." *Kwan*, 407 F.3d at 1008. The attorney also informed Kwan that "at his plea colloquy, the judge would tell him that he might suffer immigration consequences, but reassured him that there was no serious possibility that his conviction would cause him to be deported." *Id.* After Kwan entered the plea but before he was convicted and sentenced, Congress amended the Immigration and Nationality Act ("INA") to decrease the prison-sentence requirement for those aggravated felonies (a conviction of which results in mandatory, automatic deportation) of the category in which fell bank fraud, from five years to one year. *Id.* at 1008-09. The attorney did not inform Kwan or the sentencing judge of the change in the law. *Id.* at 1009. Kwan was convicted to a term of imprisonment of one year and one day and, subse-

quently, INS instituted deportation proceedings against him. *Id.*

The Ninth Circuit in *Kwan* held "where, as here, counsel has not merely failed to inform, but has effectively misled, his client about the immigration consequences of a conviction, counsel's performance is objectively unreasonable under contemporary standards for attorney competence." *Id.* at 1015. Here, the government argues that *Kwan*'s holding is limited to cases where an attorney holds himself out as an expert in immigration law. However, the fact that the attorney in *Kwan* held himself out as having "knowledge and experience" was not significant to the holding but to the factual finding that by failing to correct the earlier advice after it became incorrect, the attorney had misled his client. The holding in *Kwan* applies where the attorney has misled, in whatever way, a defendant about the immigration consequences of his plea, and while the fact that an attorney holds himself out as an expert in immigration might *contribute* to a finding that he misled his client, it is in no way crucial to such a finding under *Kwan*.

Similarly, in *United States v. Couto*, 311 F.3d 179 (2nd Cir. 2002), the Second Circuit held that "an affirmative misrepresentation by counsel as to the deportation consequences of a guilty plea is . . . objectively unreasonable" for purposes of an ineffective-assistance-of-counsel claim. *Id.* at 188. There, Couto inquired of her attorney whether she would be deported if she pled guilty to the charge of bribing a public official. *Id.* at 183. The attorney assured her that while deportation was possible, "there were many things that could be done to prevent her from being deported." *Id.* However, in reality, "because the

1996 amendments to the Immigration and Nationality Act eliminated all discretion as to deportation of non-citizens convicted of aggravated felonies, her plea of guilty meant virtually automatic, unavoidable deportation." *Id.* at 183-84. Couto's attorney, thus, had affirmatively misrepresented to her the deportation consequences of her guilty plea.

The government here argues that Lee's reliance on *Couto* is without merit because in *Couto* the attorney "took on an active role in handling the immigration issue." (Gov.'s Resp. to Lee's Second Post-Hearing Brief, D.E. 58 at 9.) Apparently, the government is referring to the fact that the attorney in *Couto* told his client that he would consult with an immigration lawyer and indeed Couto paid him to do so. *See Couto*, 311 F.3d at 183. However, nothing in *Couto* suggests that the Second Circuit in any way hinged its holding on the fact that Couto's attorney represented to her that he would seek out the expertise of an immigration lawyer. The *Couto* court devoted the majority of its analysis to explaining why it had chosen to adopt a rule applying to affirmative misadvice and spent only a single sentence applying the rule to Couto's case, stating "in the instant case, Defendant was affirmatively misled by her attorney." *Id.* at 188. With or without the attorney's promise to consult with an immigration attorney, the attorney in *Couto* affirmatively misrepresented to his client that her deportation was a matter of discretion, when in fact it was mandatory and automatic.

At the time of Lee's conviction, there was no Sixth Circuit-equivalent to *Kwan* and *Couto*. There was, however, *Sparks v. Sowders*, 852 F.2d 882 (1988), where the Sixth Circuit held that "gross misadvice concerning parole eligibility can amount to

ineffective assistance of counsel." *Id.* at 885. The petitioner in *Sparks* had pled guilty to murder upon the alleged advice of his attorney that if he went to trial and were convicted he would be sentenced to life and would be ineligible for parole. *Id.* That advice, however, was incorrect because even if the petitioner were given a life sentence, she would have been eligible for parole. *Id.*

Although *Sparks* was about parole eligibility and not about deportation, it nonetheless shows that the Sixth Circuit, before *Padilla*, was willing to recognize that affirmative misadvice concerning what might be deemed a "collateral" consequence of a conviction was, situationally, enough to support an ineffective-assistance-of-counsel claim.[10] It is but a logical extension of *Sparks* to hold that gross misadvice concerning another "collateral" consequence is constitutionally deficient representation. This is especially true of the "collateral" consequence of deportation, which may be in many cases a consequence even more undesired than parole ineligibility. Indeed, long before *Padilla*, the United States Supreme Court recognized that "[p]reserving the client's right to remain in the United States may be more important to the client than any potential jail sentence." *INS v. St. Cyr*, 553 U.S. 289, 323 (2001)(citation and internal quotation marks omitted).

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[10] *See United States v. Francis*, No. 5:10-CV-7114-KSF, 2010 WL 6428639, at *9 (E.D. Ky. Dec. 30, 2010)("While *Padilla* abrogated any reading of *Sparks* [*v. Snyders*] to restrict [ineffective-assistance] relief to affirmative misadvice, *see Padilla*, 130 S. Ct. at 1484, the holding that gross misadvice can situationally amount to ineffective assistance of counsel remains good law.").

In order to show ineffective assistance of counsel, Lee must satisfy the two-part test established in *Strickland v. Washington*, 446 U.S. 668 (1984): he must demonstrate (1) that "counsel's representation fell below an objective standard of reasonableness counsel's representation fell below an objective standard of reasonableness;" and (2) that "there is a reasonable probability that but for counsel's unprofessional errors, the result of the proceedings would have been different." *Id.* at 688 & 694. In the context of guilty pleas, the first part of the test is met when an attorney's actions are shown to have been outside the range of competence demanded of attorneys in criminal cases. *Hill v. Lockhart*, 474 U.S. 52, 59 (1985). To show prejudice in this context, the petitioner must show that "there is a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial." *Id.*

As to *Strickland*'s first prong, this court finds that Fitzgerald's representation of Lee was objectively unreasonable in that he affirmatively misadvised Lee as to the immigration consequences of pleading guilty to the drug-trafficking crime for which Lee was indicted. As explained above, at the time of Lee's conviction, it was the unanimous view of the federal circuits having had occasion to consider the question, that affirmative misadvice, as opposed to mere failure to advise, a defendant regarding the risk of deportation from a guilty plea constitutes objectively unreasonable representation under *Strickland*.[11] Furthermore, the Sixth Circuit at that

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[11] In addition to *Kwan* and *Couto*, see *Downs-Morgan v. United States*, 765 F.2d 1534, 1540-41 (11th Cir. 1985)(recognizing the

[Footnote continued on next page]

time recognized already "that affirmative misadvice concerning nonimmigration consequences of a conviction can violate the Sixth Amendment even if those consequences might be deemed 'collateral.'" *Padilla*, 130 S. Ct. at 1493 (Alito, J., concurring)(citing, *inter alia*, *Sparks*, 852 F.2d at 885).

The government argues that Fitzgerald did not affirmatively misadvise Lee, and, to the contrary, informed Lee that deportation was a possibility. That argument ignores that the attorneys in *Kwan* and *Couto* were both found to have affirmatively misled their clients even though they in fact had mentioned to their clients the possibility of deportation. Presumably, this was so because the other advice these attorneys had given to their clients provided false assurance that the possibility of deportation was not a *real* one. The same is true here. In representing to Lee that "the government" was not seeking to deport him after his guilty plea, Fitzgerald led Lee to the erroneous conclusion that a) to the extent deportation could stem from his guilty plea, it was discretionary not automatic and b) that the government had exercised that discretion *against* deporting him. Thereby, Fitzgerald's representation of Lee fell below an objective standard of reasonableness.

[Footnote continued from previous page]

possibility of an ineffective-assistance claim where counsel affirmatively misrepresents the deportation risk of a guilty plea and the defendant faces imprisonment and/or execution upon being deported) and *Santos-Sanchez v. United States*, 548 F.3d 327, 333-34 (5th Cir. 2008)(implying that counsel's advice might be objectively unreasonable under *Strickland* where such advice constituted an "affirmative misrepresentation" regarding the deportation consequence of a guilty plea).

As to *Strickland*'s second prong, the government argues that Lee cannot establish prejudice because a decision to reject the guilty plea would not "have been rational under the circumstances." (Gov.'s Resp. to Lee's Second Post-Hearing Brief, D.E. 58 at 10.) This is in contrast to the position that the government took in its response to Lee's first post-hearing brief: there, the government stated, "[i]n light of the testimony during the hearing, the United States concedes the petitioner's attorney was deficient in performance and that deficiency prejudiced the petitioner." (Gov.'s Resp. to Lee's First Post-Hearing Brief, D.E. 40 at 2.) The government went on to state, in its prior response, "[t]he record evidence elucidated that based on the petitioner's long-term ties to the United States and businesses that he owned or operated in the United States, the petitioner faced severe sanctions and would not have pleaded guilty but insisted on going to trial." (*Id.*)

The government's position in its prior brief on the issue of prejudice is not much different from Lee's. Lee argues that "his life-bonding ties are in the United States," and he "had nothing to lose by going to trial if the alternative was to be deported" because he has not been back to Korea since he left there as a child and has no connections of any sort in that country. (Lee's Second Post-Hearing Brief, D.E. 54 at 8.)

It is true, as the government now asserts, that the test for prejudice is objective, not subjective, *see Pilla v. United States*, 668 F.3d 368, 373 (6th Cir. 2012), and that a prediction of the likely outcome at trial is frequently dispositive of the inquiry, *see Maples v. Stegall*, 340 F.3d 433, 440 (6th Cir. 2003). However, Lee's likelihood of success at trial is decidedly *not* dispositive of the prejudice issue, i.e.,

whether "a decision to reject the plea bargain would have been rational under the circumstances," *Pilla*, 668 F.3d at 373 (citation and internal quotation marks omitted), because among the relevant circumstances here is the severe undesirability of Lee's returning to Korea. According to Fitzgerald, Lee's sentence, if he were convicted following at trial, would likely range from three to five years imprisonment, and, if he pled guilty, he would probably face zero to two years imprisonment. If Lee had known that either option resulted in mandatory, automatic deportation, it would have been rational for him to choose to go to trial, whatever the likelihood of success and even though he might face one to five years greater a sentence than if he had pled guilty, because under the circumstances, deportation was, objectively, at least as undesirable as any prison sentence. As such, Lee has established that he was prejudiced by his trial counsel's errors under the second prong of the *Strickland* test.

Accordingly, this court concludes that Lee's drug-trafficking conviction was obtained in violation of his Sixth Amendment right to the effective assistance of counsel and therefore cannot stand.

III. RECOMMENDATION

Based on the foregoing, the court recommends that Lee's Section 2255 motion to set aside his guilty plea and to vacate his conviction for ineffective assistance of counsel be granted.

Respectfully submitted this 6th day of August, 2013.

s/ Diane K. Vescovo
DIANE K. VESCOVO
UNITED STATES MAGISTRATE JUDGE

NOTICE

Within fourteen (14) days after being served with a copy of this report and recommended disposition, a party may serve and file written objections to the proposed findings and recommendations. A party may respond to another party's objections within fourteen (14) days after being served with a copy. FED. R. CIV. P. 72(b)(2). Failure to file objections within fourteen (14) days may constitute a waiver of objections, exceptions, and further appeal.

No. 16-327

In the Supreme Court of the United States

JAE LEE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals correctly determined that petitioner had not shown that he was prejudiced by his attorney's incorrect advice about the immigration consequences of his plea, so as to establish an ineffective assistance of counsel claim under *Strickland* v. *Washington*, 466 U.S. 668 (1984), when the evidence of his guilt was "overwhelming" and "nothing in the record" suggested that he had the option to enter a plea without immigration consequences.

TABLE OF CONTENTS

Page

Opinions below 1
Jurisdiction 1
Statement 1
Argument 6
Conclusion 17

TABLE OF AUTHORITIES

Cases:

Commonwealth v. *Lavrinenko*, 38 N.E.3d 278 (Mass. 2015) 16
DeBartolo v. *United States*, 790 F.3d 775 (7th Cir. 2015) 14, 15, 16
Hernandez v. *United States*, 778 F.3d 1230 (11th Cir. 2015) 14
Hill v. *Lockhart*, 474 U.S. 52 (1985) 7, 9, 10
Kovacs v. *United States*, 744 F.3d 44 (2d Cir. 2014) 12, 13
Missouri v. *Frye*, 132 S. Ct. 1399 (2012) 7
Moncrieffe v. *Holder*, 133 S. Ct. 1678 (2013) 15
Padilla v. *Kentucky*, 559 U.S. 356 (2010) ..... *passim*
Pilla v. *United States*, 668 F.3d 368 (6th Cir. 2012) 12
Roe v. *Flores-Ortega*, 528 U.S. 470 (2000) 8, 14
State v. *Sandoval*, 249 P.3d 1015 (Wash. 2011) 16
Strickland v. *Washington*, 466 U.S. 668 (1984) 3, 6, 7, 8, 9
United States v. *Akinsade*, 686 F.3d 248 (4th Cir. 2012) 13
United States v. *Haddad*, 486 Fed. Appx. 517 (6th Cir. 2012) 12
United States v. *Kayode*, 777 F.3d 719 (5th Cir. 2014) 12
United States v. *Orocio*, 645 F.3d 630 (10th Cir. 2011), abrogated on other grounds by *Chaidez* v. *United States*, 133 S. Ct. 1103 (2013) 14

Cases—Continued: Page

United States v. *Rodriguez-Vega*, 797 F.3d 781 (9th Cir. 2015) 14
Zemene v. *Clarke*, 768 S.E.2d 684 (Va. 2015) 16

Constitution, statutes and guidelines:

U.S. Const. Amend. VI 6
8 U.S.C. 1101(a)(43)(B) 2
8 U.S.C. 1227(a)(2(A)(iii) 2
18 U.S.C. 924(c)(2) 2
18 U.S.C. 2255 ..... 2, 3
18 U.S.C. 3553(f) 3
21 U.S.C. 841(a)(1) 1,2
21 U.S.C. 841(b) 2, 15
21 U.S.C. 841(b)(4) 15
21 U.S.C. 844(a) 15
United States Sentencing Guidelines:
§ 3E1.1 3
§ 5C1.2 3

Miscellaneous:

U.S. Dep't of Justice, *Criminal Tax Manual* (2016 rev.), https://www.justice.gov/tax/page/file/477071/download (last visited Nov. 21, 2016) 10

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JAE LEE, PETITIONER

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UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-10a) is reported at 825 F.3d 311. The order of the district court (Pet. App. 11a-50a) is unreported but is available at 2014 WL 1260388.

JURISDICTION

The judgment of the court of appeals was entered on June 8, 2016. The petition for a writ of certiorari was filed on September 6, 2016. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a guilty plea in the United States District Court for the Western District of Tennessee, petitioner was convicted on one count of possessing ecstasy with the intent to distribute, in violation of 21 U.S.C. 841(a)(1). Pet. App. 12a, 15a. He was sentenced to 12 months and one day of imprisonment, to be

followed by three years of supervised release. *Id.* at 16a-17a. Petitioner filed a motion under 28 U.S.C. 2255 to vacate his conviction and sentence, which the district court denied. Pet. App. 11a-50a. The court of appeals affirmed. *Id.* at 1a-10a.

1. Petitioner is a native of South Korea who was a restauranteur and drug dealer in Memphis, Tennessee. Pet. App. 2a. A confidential informant told federal agents that, over the course of eight years, petitioner had sold her roughly 200 ecstasy pills (and two ounces of hydroponic marijuana). Presentence Investigation Report (PSR) ¶ 7. The informant, under the surveillance of the agents, then made a controlled purchase of 15 ecstasy pills from petitioner. PSR ¶ 9. The agents later searched petitioner's townhouse, where they found 88 ecstasy pills, $32,432 in cash, three Valium tablets, and a loaded rifle. PSR ¶¶ 10, 36. Petitioner subsequently admitted both that he had possessed ecstasy and that he had distributed it to his friends. Pet. App. 2a.

A federal grand jury in the Western District of Tennessee indicted petitioner on one count of possessing ecstasy with the intent to distribute, in violation of 21 U.S.C. 841(a)(1). Pet. App. 12a. That offense qualifies as an "aggravated felony" that renders an alien subject to removal upon conviction. 8 U.S.C. 1101(a)(43)(B), 1227(a)(2)(A)(iii); 18 U.S.C. 924(c)(2); 21 U.S.C. 841(b); see Pet. App. 2a-3a. That consequence was relevant to petitioner, who came to the United States with his parents in 1982, but who has never become a U.S. citizen. Pet. App. 2a; PSR ¶¶ 34-35; see PSR ¶ 34 (noting that petitioner's sister lives in South Korea). Petitioner's attorney nevertheless "assured him that he would not be subject to * * *

removal" if he pleaded guilty. Pet. App. 2a (internal quotation marks omitted).

Petitioner ultimately pleaded guilty to the charged offense, pursuant to an agreement under which the government would (1) recommend that he receive a three-level reduction under Sentencing Guidelines § 3E1.1 for acceptance of responsibility, and (2) not object to application of the "safety valve" limitation on a statutory minimum sentence under 18 U.S.C. 3553(f) and Sentencing Guidelines § 5C1.2. 2:09-cr-20011 Docket entry No. 21 (June 18, 2009) (Plea Agreement). At sentencing, the district court varied downward from an advisory Guidelines range of 24-30 months of imprisonment and sentenced petitioner to 12 months and a day in prison. Pet. App. 16a-17a & n.6. Petitioner did not appeal. *Id.* at 18a.

2. Petitioner subsequently moved under 18 U.S.C. 2255 to vacate his conviction and sentence on the ground that his attorney had provided ineffective assistance of counsel by, *inter alia*, misadvising him about the immigration consequences of his plea. Pet. App. 18a-19a. Following an evidentiary hearing, the district court (rejecting the disposition recommended by a magistrate judge) denied relief. *Id.* at 20a, 48a; see *id.* at 51a-77a (magistrate judge's report and recommendation). The district court agreed that counsel's incorrect advice amounted to deficient attorney performance under this Court's decision in *Strickland* v. *Washington*, 466 U.S. 668 (1984), but determined that petitioner could not satisfy *Strickland*'s requirement to show that the deficient performance had prejudiced him. See Pet. App. 30a-48a.

The district court observed that this Court "has emphasized" that establishing prejudice in the context

of a guilty plea requires "'convinc[ing] the court that a decision to reject the plea bargain would have been rational under the circumstances.'" Pet. App. 31a (quoting *Padilla* v. *Kentucky*, 559 U.S. 356, 372 (2010)). The court noted that, given petitioner's sales to the confidential informant and the numerous ecstasy pills found at his home, "the Government's case against [him] was quite strong." *Id.* at 45a. The court also highlighted the "tangible benefits" petitioner received from pleading, which "appear[ed] to have greatly reduced his sentence." *Id.* at 46a. And the court reasoned that "[i]n light of the overwhelming evidence of [petitioner's] guilt, a decision to take the case to trial would have almost certainly resulted in a guilty verdict, a significantly longer prison sentence, and subsequent deportation." *Ibid.*

3. The court of appeals affirmed. Pet. App. 1a-10a. The government conceded that petitioner's counsel had rendered deficient performance, so the court considered only whether petitioner had established prejudice. *Id.* at 3a.

The court of appeals acknowledged that immigration consequences are "relevant to the prejudice inquiry," because "a 'reasonable' non-citizen charged with a deportation-triggering offense will, if properly advised, consider deportation consequences in deciding whether to plead guilty and might, as a result, be willing to go to trial even if he faces a low probability of success, one that might lead a citizen to accept a plea." Pet. App. 8a. But it declined to hold "that a decision to reject a plea deal that would trigger deportation consequences is *ipso facto* 'rational under the circumstances' regardless of the merits of the defense." *Ibid.* It instead "join[ed] the Second, Fourth,

and Fifth Circuits in holding that a claimant's ties to the United States should be taken into account in evaluating, *alongside the legal merits*, whether counsel's bad advice caused prejudice." *Id.* at 10a.

Although the court of appeals viewed decisions in four other circuits as allowing a showing of prejudice in a wider range of circumstances, it was "convinced" that such a broad approach was mistaken. Pet. App. 5a; see *id.* at 4a (citing decisions of the Third, Seventh, Ninth, and Eleventh Circuits). The court observed that in *Padilla* v. *Kentucky*, *supra*, this Court had "emphasized 'the fact that it is often quite difficult for petitioners who have acknowledged their guilt to satisfy *Strickland*'s prejudice prong'" and had "declined to craft a deportation-specific prejudice rule" for a defendant who, like petitioner here, "had lived in the United States legally for decades and had alleged that 'he would have insisted on going to trial if he had not received incorrect advice from his attorney.'" Pet. App. 9a (quoting *Padilla*, 559 U.S. at 359, 371 n.12). The court accordingly refused to adopt an approach that "would provide those in [petitioner's] position with a ready-made means of vacating their convictions *whenever* they can show that counsel failed to adequately explain deportation consequences." *Ibid.*

The court of appeals determined that petitioner had not established prejudice on the facts of this case. Pet. App. 10a. The court accepted "the district court's conclusion that the evidence of guilt was 'overwhelming'" and stressed that "deportation would have followed just as readily from a jury conviction as from a guilty plea." *Id.* at 3a. "Thus," the court determined, "aside from the off chance of jury nullification or the like, [petitioner] stood to gain nothing from going to

trial but more prison time." *Ibid.* Observing that "the possibility of arbitrariness, whimsy, caprice, nullification, and the like * * * are irrelevant to the prejudice inquiry' under *Strickland*," *id.* at 7a (quoting *Strickland*, 466 U.S. at 695 (internal quotation marks omitted)), the court explained that the "problem for [petitioner] is that he has no *bona fide* defense, not even a weak one," *id.* at 10a. The court also found the possibility that "the prosecutor might have agreed to allow [petitioner] to plead guilty to a non-deportable defense if his attorney had pursued the matter" to be "sheer speculation." *Id.* at 7a-8a.

ARGUMENT

Petitioner contends (Pet. 20-23) that the court of appeals erred in holding that he had failed to show that he was prejudiced by his counsel's incorrect advice about the immigration consequences of a conviction. The court's holding is correct and further review is not warranted.

1. a. Under *Strickland* v. *Washington*, 466 U.S. 668 (1984), a defendant making a Sixth Amendment claim of ineffective assistance of counsel must show both (1) deficient performance, namely, "that counsel's representation fell below an objective standard of reasonableness," *id.* at 689, and (2) prejudice, namely, "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different," *id.* at 694. To demonstrate prejudice "[i]n cases where a defendant complains that ineffective assistance led him to accept a plea offer as opposed to proceeding to trial, the defendant will have to show 'a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial.'" *Missouri* v.

Frye, 132 S. Ct. 1399, 1409 (2012) (quoting *Hill* v. *Lockhart*, 474 U.S. 52, 59 (1985)).

This Court has made clear that the inquiry into whether a defendant would have forgone a plea includes an objective inquiry into his chances of prevailing at trial. The Court has explained, for example, that "where the alleged error of counsel is a failure to advise the defendant of a potential affirmative defense to the crime charged, the resolution of the 'prejudice' inquiry will depend largely on whether the affirmative defense likely would have succeeded at trial." *Hill*, 474 U.S. at 59-60. Such "predictions of the outcome at a possible trial," the Court added, "should be made objectively, without regard for the 'idiosyncrasies of the particular decisionmaker.'" *Id.* at 59-60 (quoting *Strickland*, 466 U.S. at 695).

The Court's decision in *Padilla* v. *Kentucky*, 559 U.S. 356 (2010), likewise supports such an objective inquiry. In *Padilla*, the Court considered a claim of ineffective assistance by an alien defendant who, like petitioner, had lived in the United States for decades, pleaded guilty to a removable offense, and "allege[d] that he would have insisted on going to trial if he had not received incorrect advice from his attorney" about the immigration consequences of a conviction. *Id.* at 359. The Court held that the attorney's performance had been deficient and remanded for the lower courts to conduct a prejudice inquiry in the first instance. See *id.* at 360, 374. In analyzing the attorney's performance, the Court recognized that "preserving the client's right to remain in the United States may be more important to the client than any potential jail sentence." *Id.* at 368 (citation omitted). But on the issue of prejudice, the Court explained that "to obtain

relief on this type of claim, a petitioner must convince the court that a decision to reject the plea bargain would have been rational under the circumstances." *Id.* at 372 (citing *Roe* v. *Flores-Ortega*, 528 U.S. 470, 486 (2000)). And it emphasized that "it is often quite difficult for petitioners who have acknowledged their guilt to satisfy *Strickland*'s prejudice prong." *Id.* at 371 n.12.

b. The court of appeals correctly determined that petitioner has not made the requisite showing of prejudice here. Because the evidence was overwhelming, petitioner could not show that it would have been rational to go to trial as a means of avoiding removal. Removal "would have followed just as readily from a jury conviction as from a guilty plea." Pet. App. 3a. And because any "jury act[ing] according to law," *Strickland*, 466 U.S. at 694, would have found petitioner guilty, see Pet. App. 3a, petitioner "stood to gain nothing from going to trial but more prison time," *ibid.* Nor was there anything "in the record" to suggest that "the prosecutor might have agreed to allow [petitioner] to plead guilty to a non-deportable offense if his attorney had pursued the matter." *Id.* at 7a-8a.

Petitioner does not dispute that the evidence against him—which included a controlled drug purchase and a large quantity of drugs found in his home—was "overwhelming." Pet. App. 3a; *id.* at 46a-47a. Accordingly, petitioner's only prospect of prevailing at trial was the "off chance of jury nullification or the like." *Id.* at 3a. As the court of appeals recognized (*id.* at 7a), however, jury nullification and other outcomes that are not based upon the facts and the law are irrelevant to an objective analysis of whether

a defendant would have been better off had he refused to plead guilty. See *Hill*, 474 U.S. at 60; *Strickland*, 466 U.S. at 695. As the Court explained in *Strickland*, because a "defendant has no entitlement to the luck of a lawless decisionmaker," an "assessment of the likelihood of a result more favorable to the defendant must exclude the possibility of arbitrariness, whimsy, caprice, 'nullification,' and the like" and instead "proceed on the assumption that the decisionmaker is reasonably, conscientiously, and impartially applying the standards that govern the decision." 466 U.S. at 695.

c. Petitioner's challenge to the holding below would effectively amount to a *per se* rule of prejudice whenever a defendant asserts that he would not have taken a plea deal had he been properly advised of the immigration consequences of a conviction. Such a rule is unwarranted and cannot be squared with the objective focus of the prejudice inquiry, see, *e.g.*, *Padilla*, 559 U.S. at 372; this Court's emphasis on the difficulty of proving prejudice, see, *e.g.*, *id.* at 371 n.12; and the remand for further proceedings on prejudice in *Padilla*, the circumstances of which were similar to this case, *id.* at 359-360, 374.

Petitioner contends (Pet. 20-21) that, had he known of the immigration consequences of a conviction on the charged offense, he "could have attempted to negotiate for an outcome that would not have carried automatic deportation sanctions." That contention departs from his argument in the court of appeals, which was limited to the contention that he would have taken his chances at trial. See Pet. C.A. Br. 35-39. In any event, the court viewed the possibility that petitioner might have pleaded guilty to a nonremovable offense

to be "sheer speculation" without any support "in the record." Pet. App. 8a. Having failed to introduce evidence on this point at the evidentiary hearing, petitioner cannot now seek to do so in the petition. Nor can he sustain his claim based on generalized descriptions of prosecutorial practices, which are in any event inaccurate. See U.S. Dep't of Justice, *Criminal Tax Manual* §§ 10.02, 16.06 (2016 rev.), https://www.justice.gov/tax/page/file/477071/download (last visited Nov. 21, 2016) (explaining circumstances under which misdemeanor tax charges are appropriate). And because his argument would seem to apply to any alien who might claim that he could have negotiated a better deal to avoid removal, accepting that argument would lead to automatic findings of prejudice for all or nearly all defendants whose attorneys misadvise them about the immigration consequences of conviction.

Petitioner also posits (Pet. 22-23) two reasons why, had he known the immigration consequences of conviction, he might have preferred *losing* at trial, with a resulting longer prison sentence, to the shorter sentence he achieved through the plea. He did not advance any such argument in the court of appeals, and he makes no attempt to tie it to his testimony at the evidentiary hearing. Cf. *Hill*, 474 U.S. at 60 (rejecting ineffective-assistance claim where defendant "failed to allege the kind of 'prejudice' necessary to satisfy" *Strickland*). In any event, his putative reasons for preferring a loss at trial are neither "rational," *Padilla*, 559 U.S. at 372, nor likely to have formed part of petitioner's subjective calculus. Cf. *Hill*, 474 U.S. at 59 (considering how particular factor would have affected defendant's decisionmaking). Petitioner

provides no factual basis for believing that he would willingly have invited a much longer prison sentence on the vague hope that, during the extra time, legislative or executive policy towards aliens convicted of aggravated felonies would change in a way that favored him. Nor is it reasonable to believe, again, without any evidence, that he would have preferred limited prison visitation rights, at a facility that may have been nowhere near his family and friends, to freedom elsewhere.

2. Petitioner's claim of a circuit conflict reads the court of appeals' decision more rigidly than the opinion's language indicates. And while courts have not articulated a uniform approach to prejudice analysis in cases where a defendant's counsel has provided deficient advice about the immigration consequences of a plea, denial of relief on the facts of this case is not inconsistent with any decision of another court of appeals.

a. Contrary to the implication of the question presented (Pet. i), the court of appeals did not hold in this case that "it is *always* irrational" for a defendant who faces removal upon conviction to go to trial when the evidence against him is "strong" (emphasis added). Rather, the court's "holding" was only that a court "should * * * take[] into account" both "a claimant's ties to the United States" *and* "the legal merits" in determining "whether counsel's bad advice caused prejudice." Pet. App. 10a (emphasis omitted). In recognizing that both factors are relevant, the court distinguished between a defendant whose case was merely "weak" and a defendant like petitioner who had "no *bona fide* defense" to the charge against him. *Ibid.* The other precedential Sixth Circuit decision on which

petitioner relies (Pet. 12), *Pilla* v. *United States*, 668 F.3d 368 (2012), similarly addressed a situation in which the defendant "had no rational defense." *Id.* at 373; see *United States* v. *Haddad*, 486 Fed. Appx. 517, 521 (6th Cir. 2012) (observing that the defendant "ha[d] no rational defense") (cited at Pet. 2, 11, 23). And the court in this case left open the potential for a different result for a defendant who, unlike petitioner, provides evidence that he could have obtained a different plea deal had he been aware of the immigration consequences of the one to which he agreed. See *id.* at 7a-8a (acknowledging the "possibility" of such an outcome, but finding no evidence supporting it "in the record before us").

b. The court of appeals observed (Pet. App. 4a), and petitioner does not dispute (Pet. 12-13), that its decision in this case accords with the Fifth Circuit's decision in *United States* v. *Kayode*, 777 F.3d 719 (2014). The court in that case examined the "totality of the circumstances," including a number of factors, to conclude that the defendant had not shown prejudice. *Id.* at 725; see *id.* at 725-729. One of the "important" factors was "overwhelming evidence against" the defendant, see *id.* at 726 (internal quotation marks omitted), which made success at trial improbable and therefore "weigh[ed] against finding prejudice," *id.* at 727.

The court of appeals also observed (Pet. App. 4a) that its decision in this case accords with decisions of the Second and Fourth Circuits. Petitioner errs in contending otherwise (Pet. 14-15). Consistent with the court of appeals' holding here, the Second Circuit in *Kovacs* v. *United States*, 744 F.3d 44 (2014), held that prejudice in this context requires showing "a

reasonable probability that the petitioner could have negotiated a plea that did not impact immigration status or that he would have litigated an available defense." *Id.* at 52. The Second Circuit found the defendant in that case to have satisfied that standard based on circumstances—record evidence showing a reasonable probability of a different plea deal and the existence of a limitations defense—that have no analogue here. See *id.* at 53-54.

Likewise, consistent with the court of appeals' holding here, the Fourth Circuit in *United States* v. *Akinsade*, 686 F.3d 248, 255-256 (2012), held that in analyzing prejudice, "the potential strength of the state's case must inform our analysis, inasmuch as a reasonable defendant would surely take it into account." *Id.* at 255 (citation, internal quotation marks and alteration omitted). The Fourth Circuit found prejudice in that particular case based on the defendant's potential trial defense that his fraud did not exceed the relevant statutory threshold of $10,000. *Id.* at 255-256. Petitioner is thus wrong to suggest (Pet. 14), that the evidence in that case, like the evidence here, was "overwhelming."

c. The court of appeals did view its approach to prejudice in this case to be different from the approaches of four other circuits. See Pet. App. 4a. But notwithstanding any difference in approaches, it is far from clear that any other circuit would in fact have found prejudice in the specific circumstances of this case, where no evidence supports the possibility of a more favorable outcome had petitioner been informed of the immigration consequences of a conviction. As this Court has recognized, "whether a given defendant has made the requisite showing [of prejudice] will turn

on the facts of a particular case." *Flores-Ortega*, 528 U.S. at 485 (citation omitted); see *Padilla*, 559 U.S. at 372 (prejudice inquiry asks whether a defendant's "decision to reject the plea bargain would have been rational *under the circumstances*") (emphasis added).

Neither *United States* v. *Rodriguez-Vega*, 797 F.3d 781 (9th Cir. 2015), nor *Hernandez* v. *United States*, 778 F.3d 1230 (11th Cir. 2015), explicitly addressed a situation in which, as in this case, the defendant had "no *bona fide* defense" (Pet. App. 10a) and no possibility of a better plea deal. See *Rodriguez-Vega*, 797 F.3d at 788-792; *Hernandez*, 778 F.3d at 1234. Nor did the Third Circuit address such a situation in *United States* v. *Orocio*, 645 F.3d 630 (2011), abrogated on other grounds by *Chaidez* v. *United States*, 133 S. Ct. 1103 (2013). In that case, the Third Circuit rejected an approach under which proof of prejudice would require not only a showing that the defendant would have rejected a guilty plea, but also a showing "that he would have been acquitted, had he gone to trial." *Id.* at 643; see *id.* at 645 (quoting district court's requirement that the defendant show "that he would not have been convicted at trial"). It then reasoned, based on the facts as alleged in that case, that the defendant there "rationally could have been more concerned about a near-certainty of multiple decades of banishment from the United States than the *possibility* of a single decade in prison," and it remanded for an evidentiary hearing. *Id.* at 645 (emphasis added); see *id.* at 646. It did not consider an argument that, in fact, no legitimate possibility existed of avoiding an unfavorable trial outcome.

Finally, although the government argued in *DeBartolo* v. *United States*, 790 F.3d 775 (2015), that "the

evidence [wa]s so stacked against [the defendant] that he would not in fact have insisted on a trial," *id.* at 778, the Seventh Circuit found otherwise, concluding instead that "conviction would not have been the sure thing that the government claims," *id.* at 779. The Seventh Circuit observed that the "defense * * * would have been that [the defendant's] marijuana project was a flop, that he had obtained only a few ounces of the drug from it, and that he had given that meager harvest away rather than selling it." *Ibid.* The Seventh Circuit appeared to view such a defense, if believed by the jury, as a potential way to avoid removal, because it would have led to conviction for "simple possession of marijuana (which would not have been a basis for mandatory deportation)." *Ibid.* Under the drug statutes, when someone is convicted of "distributing a small amount of marihuana for no remuneration," his offense is treated as simple marijuana possession, which for non-recidivists is a misdemeanor offense that does not qualify as an "aggravated felony" for purposes of removal. 21 U.S.C. 841(b)(4); see 21 U.S.C. 844(a); *Moncrieffe* v. *Holder*, 133 S. Ct. 1678, 1689 (2013).* No similar misdemeanor-punishment option is available for the ecstasy-distribution offense with which petitioner was charged, see 21 U.S.C. 841(b), and petitioner's situation is thus distinct from the situation of the defendant in *DeBartolo*.

---

* Although the defendant in *DeBartolo* had a prior drug conviction, 790 F.3d at 777, the government had not filed an information about that conviction, *id.* at 778-779, and the court presumed that a marijuana-possession conviction "would not have been a basis for mandatory deportation," *id.* at 779.

The Seventh Circuit also supported its prejudice finding in *DeBartolo* by reference to additional factors that were not credited by the court of appeals in this case—*e.g.*, the possibility of jury nullification and speculation about a more favorable plea deal, see 790 F.3d 778-780. A future Seventh Circuit panel, however, would not be bound to view those factors alone as mandating a finding of prejudice. Doing so would essentially amount to a *per se* rule of prejudice, which would be inconsistent with the decisions of this Court. See pp 6-11, *supra*. Any claim of a conflict based on the statements in *DeBartolo* is therefore premature and does not warrant this Court's intervention.

d. State-court decisions cited by petitioner's amicus (AAJC Amicus Br. 5-6) likewise fail to demonstrate that the courts deciding those cases would have reached a different result in this one. See *Commonwealth* v. *Lavrinenko*, 38 N.E.3d 278, 292-297 (Mass. 2015) (remanding for evidentiary hearing on prejudice that would address, *inter alia*, viability of defendant's proposed trial defenses); *Zemene* v. *Clarke*, 768 S.E.2d 684, 692 (Va. 2015) (remanding for evidentiary hearing where defendant "objectively" stood to gain from going to trial); *State* v. *Sandoval*, 249 P.3d 1015, 1022 (Wash. 2011) (en banc) (concluding, without confronting any argument that evidence against the defendant was overwhelming, that insisting on trial would have been rational). Further review is accordingly unwarranted.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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ORIG

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IN THE

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JAE LEE, *Petitioner*,

v.

UNITED STATES OF AMERICA, *Respondent*.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

REPLY BRIEF 1

I. The Court's review is warranted to resolve an acknowledged circuit split 2

II. The government's prejudice test is inapplicable to the circumstances here 4

III. The government does not deny the importance of the question presented nor meaningfully contest that this case is an appropriate vehicle to resolve it 8

CONCLUSION 10

TABLE OF AUTHORITIES

Page(s)

Cases

DeBartolo v. *United States*,
790 F.3d 775 (7th Cir. 2015) 2, 6

Hernandez v. *United States*,
778 F.3d 1230 (11th Cir. 2015) 3

Hill v. *Lockhart*,
474 U.S. 52 (1985) 4, 5

Kovacs v. *United States*,
744 F.3d 44 (2d Cir. 2014) 3

Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians v. *Patchak*,
132 S. Ct. 2199 (2012) 4

Padilla v. *Kentucky*,
559 U.S. 356 (2010) 4, 5

United States v. *Akinsade*,
686 F.3d 248 (4th Cir. 2012) 3

United States v. *Orocio*,
645 F.3d 630 (3d Cir. 2011) 2

United States v. *Rodriguez-Vega*,
797 F.3d 781 (9th Cir. 2015) 3

REPLY BRIEF

The government concedes that "courts have not articulated a uniform approach to prejudice analysis in cases where a defendant's counsel has provided deficient advice about the immigration consequences of a plea." Br. in Opp'n 11. Yet the government maintains that Petitioner Jae Lee's "claim of a circuit conflict reads the court of appeals' decision more rigidly than the opinion's language indicates." *Ibid.* Not so. The Sixth Circuit expressly recognized there is a deep, mature, and "growing circuit split" over the answer to the question presented. App. 5a. And had Mr. Lee's plea taken place in one of the numerous circuits on the other side of the split, that geography would have been dispositive.

Regardless of which side of the circuit split has the better of the argument, the issue presented is important and the conflict should be resolved without delay. First, the split exposes defendants to "potentially disparate outcomes, based purely on the happenstance of the circuit where he or she pleads guilty." Center on the Admin. of Criminal Law Amicus Curiae Br. 8. Second, state courts "are the most common forum for ineffective assistance of counsel claims," and "state high courts are *also* split on the issue of when the deportation consequences of a guilty plea establish prejudice." AAJC & Other Immigrants' Rights Groups Amici Curiae Br. 4–5 (emphasis added). Finally, the Sixth Circuit's reasoning deprives Mr. Lee and similarly situated defendants of their ability to invoke their constitutional right to trial based solely on the ineffective assistance of their counsel. Nat'l Ass'n of Criminal Defense Lawyers Amicus Curiae Br. 2.

The petition should be granted.

I. The Court's review is warranted to resolve an acknowledged circuit split.

The government acknowledges that "the court of appeals *did* view its approach to prejudice in this case to be different from the approaches of four other circuits." Br. in Opp'n 13 (emphasis added). That concession alone demonstrates why the Court should grant the petition. Nonetheless, the government insists, it is "far from clear" that a different circuit would have found prejudice in the specific circumstances of Mr. Lee's case. *Id.* at 13–15. It is difficult to understand why that would be so. For example, the Seventh Circuit articulated four independent reasons why it would be rational for a defendant to reject a plea to a shorter sentence if the plea would cause mandatory deportation: (1) to try to negotiate a non-deportable plea, (2) to take the high risk of a longer sentence on the chance that a not-guilty verdict would allow the defendant to remain in the United States, (3) to accept a longer sentence in the United States over a short sentence and swift deportation, or (4) to hope for a change in law or government priorities. *DeBartolo* v. *United States*, 790 F.3d 775, 779–80 (7th Cir. 2015). Each reason applies equally to Mr. Lee.

The same is true in *United States* v. *Orocio*, 645 F.3d 630 (3d Cir. 2011). There, faced with overwhelming evidence of guilt, the Third Circuit still believed Orocio "rationally could have been more concerned about a near-certainty of multiple decades of banishment from the United States than the possibility of a single decade in prison." *Id.* at 645. That fact was enough for Orocio to show prejudice, and it would for Mr. Lee as well.

So too the decisions of the Ninth and Eleventh Circuits. In *United States* v. *Rodriguez-Vega*, 797 F.3d 781 (9th Cir. 2015), the court concluded that Rodriguez-Vega could show prejudice even if "removal was virtually certain" if she went to trial, *id.* at 790, because she could have negotiated for a non-deportable plea offense or could have reasonably chosen to risk a longer prison term rather than plead guilty to a deportable offense. And in *Hernandez* v. *United States*, 778 F.3d 1230 (11th Cir. 2015), the defendant likewise "could have rationally chosen to risk longer incarceration *for the chance* to avoid deportation, despite sufficient evidence of guilt to result in a grand jury indictment. *Id.* at 1234 (emphasis added). Applying the same reasoning in these decisions to the specific circumstances of Mr. Lee's case would likely result in a finding of prejudice.

Finally, the government says that the Sixth Circuit's ruling follows the Second and Fourth Circuit decisions in *Kovacs* v. *United States*, 744 F.3d 44 (2d Cir. 2014), and *United States* v. *Akinsade*, 686 F.3d 248 (4th Cir. 2012). Br. in Opp'n 13. This assertion is incorrect, as Mr. Lee explained in the petition. Pet. 14–15. More important, the assertion is irrelevant to the merits of the petition. Whether the circuits are evenly divided 4-4 or instead are split 6-2 in favor of Mr. Lee, this Court should grant the petition and resolve the well-developed circuit conflict.

II. The government's prejudice test is inapplicable to the circumstances here.

Given the Sixth Circuit's acknowledgment of the growing circuit split, App. 5a, the government spends the bulk of its opposition brief arguing that review is not warranted because the Sixth Circuit's holding is correct. Br. in Opp'n 6–11. That is not a reason to deny the petition. Cf. *Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians* v. *Patchak*, 132 S. Ct. 2199 (2012) (resolving circuit split by affirming the decision below). The argument is also wrong.

1. The government first contends that resolution of the prejudice inquiry "will depend largely on whether the [defendant] would have succeeded at trial," Br. in Opp'n 7 (quoting *Hill* v. *Lockhart*, 474 U.S. 52, 59–60 (1985)), and says it is difficult for petitioners who have acknowledged their guilt to satisfy this prejudice requirement, Br. in Opp'n 8 (citing *Padilla* v. *Kentucky*, 559 U.S. 356, 371 n.12 (2010)). But the government is attempting to apply a prejudice test this Court created for ineffective assistance on the merits, not ineffective assistance regarding advice on collateral consequences.

In *Hill*, this Court noted that the *Strickland* prejudice inquiry closely resembles "the inquiry engaged in by courts reviewing ineffective assistance challenges obtained through a trial." 474 U.S. at 59. In such circumstances, if counsel fails to investigate or discover potentially exculpatory evidence, or fails to advise regarding an affirmative defense, the question is whether the evidence or defense would have changed the outcome at trial. *Ibid.*

But where prejudice flows from the collateral consequences of a plea, a court instead asks whether, had counsel "correctly informed" the defendant at the plea stage, the defendant "would have pleaded guilty and insisted on going to trial." *Hill*, 474 U.S. at 60. The petitioner in *Hill* could not show prejudice because he did not allege that parole eligibility was a factor he considered in deciding whether to plead guilty. *Ibid.* But the exact opposite is true here. As the Magistrate found in her Report and Recommendation, the "testimonies of Lee and Fitzgerald were consistent that deportation *was the determinative issue* in Lee's decision whether to accept the plea deal." App. 56a (emphasis added).

To be sure, this Court in *Padilla* observed that it is difficult for petitioners who have acknowledged guilt to show that they would have succeeded at trial but for their counsel's ineffective assistance. 559 U.S. at 371 n.12. But that discussion referenced the same portion of the *Hill* opinion discussed above and related to ineffective assistance on the merits. *Id.* (citing *Hill*, 474 U.S. at 59–60). It is irrelevant here.

2. The government says that the evidence against Mr. Lee was overwhelming, and that the concept of jury nullification is immaterial to an objective analysis of whether a defendant would have been better off to invoke his right to trial. Br. in Opp'n 8–9 (citations omitted). The government also says there is nothing in the record to suggest the prosecutor might have agreed to a plea to a non-deportable offense. *Id.* at 8. Neither of these arguments should be a barrier to granting the petition.

On the first point, the government is wrong to assume that Mr. Lee's only hope is jury nullification. When a defendant invokes his right to trial, his counsel sometimes discovers new legal issues to be advanced, or new flaws in the prosecution's evidence. Nat'l Ass'n of Criminal Defense Lawyers Amicus Curiae Br. 4. Moreover, juries are unpredictable, especially when taking seriously their instruction to render a guilty verdict only when the prosecution proves guilt beyond a reasonable doubt, the highest burden of proof the law can impose. *Id.* at 5. The not-guilty verdicts of O.J. Simpson, George Zimmerman, and the Los Angeles police officers in the Rodney King case are all examples of a jury putting the government to its proofs. *Id.* at 6–7. That is why defendants should always have the ability to invoke their constitutional right and "choose trial for any reason or for no reason" at all. *Id.* at 5.

On the second point, it is nonsensical to fault Mr. Lee for having nothing in the record suggesting that he had an opportunity to plead to a non-deportable offense. Br. in Opp'n 8, 9, 10. Mr. Lee's counsel never sought another deal because counsel erroneously believed the plea he had already negotiated would not result in deportation. App. 56a, 57a. For the same reason, the Seventh Circuit in *DeBartolo* did not demand that the defendant prove there was a better plea he could have pursued but instead recognized that the defendant "could have *tried* to negotiate a different plea deal for an offense that does not make deportation mandatory." 790 F.3d at 779 (emphasis added). As the Magistrate found here, "it would have been [objectively] rational for [Mr. Lee] to choose to go to trial, *whatever* the likelihood of success *and even though* he might face one to five years greater a sentence than if he had pled guilty,

because under the circumstances, deportation was, objectively, at least as undesirable as *any* prison sentence." App. 76a (emphasis added).

3. Turning to policy, the government argues that granting Mr. Lee relief would effectively amount to a *per se* rule of prejudice whenever a defendant asserts that he would not have taken a plea deal had he been properly advised of the immigration consequences of a conviction. Br. in Opp'n 9. That is incorrect. Under Mr. Lee's approach, lower courts will still conduct an "objective" inquiry into a defendant's rational options. And that inquiry will necessarily turn on a wide variety of facts, including how long the defendant has lived in the United States, his connection to his birth country, his ability to speak his birth country's native language, his proximity to family and friends in the United States, and the like. There would be no *per se* rule.

4. Finally, the government notes in passing that Mr. Lee received "tangible benefits" from pleading guilty in the form of a "greatly reduced sentence." Br. in Opp'n 4 (quoting App. 45a, 46a). What the government does not mention is that despite being sentenced on September 28, 2009, to an incarceration period of 12 months and a day, App. 57a, Mr. Lee has now served more than *seven years* in custody, waiting to see whether he will be released to his home in the United States or deported to a country in which he has not stepped foot for nearly 35 years. In other words, while Mr. Lee has seen none of the purported benefits of his plea, he will experience all the downside of his counsel's ineffective assistance if this Court denies the petition.

III. The government does not deny the importance of the question presented nor meaningfully contest that this case is an appropriate vehicle to resolve it.

Having already conceded there is a deep and mature circuit split, the government does not deny the importance of the question presented. Pet. 23–24. And, aside from making the erroneous argument that Mr. Lee could not prevail under the prejudice standard articulated by other circuits, the government does not contest this case is an ideal vehicle to resolve that question. Pet. 24.

Additional reasons counsel for this Court's immediate review, as explained by the amici brief for Asian Americans Advancing Justice (AAJC) and 14 other immigrants' rights groups:

- "[T]he instances of noncitizen defendants receiving deficient advice of counsel—even after making clear that their primary goal is avoiding deportation—is all too common." AAJC Br. 2.
- "[T]he [circuit] conflict is widespread and affects noncitizen defendants and their families throughout the nation." *Id.* at 3.
- The conflict "ignores the experience of thousands of defendants and families who have faced this dilemma, and who have made it clear that their predominant goal is taking every step possible, including the constitutionally protected step of insisting on a trial, to avoid deportation." *Ibid.*

- The circuits applying the wrong prejudice standard inflict harms not only on non-citizen defendants but "on American citizens, like Mr. Lee's elderly parents." *Id.* at 4.
- And state high courts, like the federal circuits, "are also split on the issue of when the deportation consequences of a guilty plea establish prejudice." *Id.* at 4–6.

This Court's grant of the petition will eliminate the "patchwork and haphazard" Sixth Amendment jurisprudence in the lower federal courts and state high courts regarding the question presented. Center on the Admin. of Criminal Law Amicus Curiae Br. 9; AAJC Br. 4–6. It will directly impact the over 4.3 million noncitizens who live in the Fifth and Sixth Circuits alone. AAJC Br. 7. And it will address the humanitarian harms of deportation. *Id.* 8–14. As the Sixth Circuit noted, it is unclear "why it is in our national interests—much less the interests of justice—to exile a productive member of our society to a country he hasn't lived in since childhood for committing a relatively small-time drug offense." App. 10a. It is even less clear when the exile is the result of unconstitutionally ineffective counsel.

CONCLUSION

For the foregoing reasons and those stated in the petition for a writ of certiorari, the petition should be granted.

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RECORD AND BRIEFS

No. 16-237

IN THE

Supreme Court of the United States

JAE LEE,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR ASIAN AMERICANS ADVANCING JUSTICE | AAJC AND OTHER IMMIGRANTS' RIGHTS GROUPS AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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TABLE OF CONTENTS

Page

TABLE OF CONTENTS i

TABLE OF CITED AUTHORITIES ii

INTEREST OF *AMICI CURIAE* AND SUMMARY OF ARGUMENT 1

ARGUMENT 4

I. The petition raises issues of nationwide scope, and conflicting state high court decisions underscore the importance of granting review. 4

II. The question presented is important because a narrow prejudice rule improperly ignores the humanitarian harms of deportation. 8

CONCLUSION 15

APPENDIX 1a

TABLE OF CITED AUTHORITIES

Page

CASES

Bahtiraj v. State,
840 N.W.2d 605 (N.D. 2013).....5

Bridges v. Wixon,
326 U.S. 135 (1945).....11

Commonwealth v. Lavrinenko,
38 N.E.3d 278 (Mass. 2015).....5

DeBartolo v. United States,
790 F.3d 775 (7th Cir. 2015).....12

INS v. St. Cyr,
533 U.S. 289 (2001).....2, 11

Jones v. Barnes,
463 U.S. 745 (1983).....12

Moore v. City of East Cleveland,
431 U.S. 494 (1977).....3

Padilla v. Commonwealth,
381 S.W.3d 322 (Ky. Ct. App. 2012).....13

Padilla v. Kentucky,
559 U.S. 356 (2010).....2, 4

People v. De Jesus,
935 N.Y.S.2d 464 (N.Y. App. Div. 2011).....13

Cited Authorities

Page

People v. Guzman,
24 N.E.3d 831 (Ill. App. Ct. 2014) 13

People v. Peque,
980 N.Y.S.2d 280 (N.Y. 2013).....5

Segura v. State,
749 N.E.2d 496 (Ind. 2001) 5

State v. Sandoval,
249 P.3d 1015 (Wash. 2011) 5

United States v. Orocio,
645 F.3d 630 (3d Cir. 2011) 12

Zemene v. Clarke,
768 S.E.2d 684 (Va. 2015) 5

STATUTES AND OTHER AUTHORITIES

Sixth Amendment to the U.S. Constitution.....4

8 U.S.C. § 1227(a)(2) 9

8 U.S.C. § 1229b(a)(3) 9

Sup. Ct. R. 10(a).....6

Sup. Ct. R. 37.....1

Cited Authorities

Page

Am. Immigration Council, *New Americans in Tennessee* 7

Am. Immigration Council, *New Americans in Texas* 8

Bryan Baker & Nancy Rytina, *Estimates of the Lawful Permanent Resident Population in the United States*: January 2013 (2014) 8-9

Bryan Lonegan, *American Diaspora: The Deportation of Lawful Residents from the United States and the Destruction of Their Families*, 32 N.Y.U. REV. L. & SOC. CHANGE 55 (2007) 10, 11

Ctr. for Am. Progress, *The Facts on Immigration Today* 9

Drug Policy Alliance, *The Drug War and Mass Deportation* (Feb. 2016) 10

Jingyuan Ma & Mel Marquis, *Business Culture in East Asia and Implications for Competition Law*, 51 TEX. INT'L L.J. 1 (2016) 14

Katharine Q. Seelye, *In Heroin Crisis, White Families Seek Gentler War on Drugs*, The New York Times (Oct. 30, 2015) 6

Maddie McGarvey, *Ravages of Heroin*

Cited Authorities

Page

Addiction Haunt Friends, Families and Whole Towns, NPR (Aug. 23, 2015) 6

Nancy Morawetz, *Understanding the Impact of the 1996 Deportation Laws and the Limited Scope of Proposed Reforms*, 113 HARV. L. REV. 1936 (2000).....10

The Henry J. Kaiser Family Found., *Population by Citizenship Status in 2015*, at Table 1 (2016) 1, 7

The Pew Ctr., *5 Facts About Illegal Immigration In The U.S.* (2016).....9

U.S. Dep't Homeland Sec., ICE Enforcement and Removal Operations Report (2015) 10

U.S. Department of Health & Human Services, *The Opioid Epidemic: By the Numbers*.....6

INTEREST OF *AMICI CURIAE* AND SUMMARY OF ARGUMENT

Amici are non-profit organizations that promote equality, justice, and civil rights for immigrants.[1] A full list of amici is included in Appendix A.

Amici are united in urging this Court to grant the petition. The issue in this case is not only important for Mr. Lee's family but also for millions of other American families. There are currently nearly 23 million noncitizens residing in the United States (representing 7% of the American population).[2] Under current immigration statutes, families face a unique and devastating threat if any noncitizen family member gets caught up in the criminal justice system. A conviction on any one of a wide array of offenses, including first-time, minor, and non-violent offenses, like drug possession, subjects noncitizens to mandatory deportation and detention pending removal proceedings. For immigrant and mixed-status families, the problems that currently confront American families, like a family member facing drug addiction problems, have far more drastic consequences. As in Mr. Lee's case, a conviction for even "a relatively small-time drug

1. No party or its counsel wrote or helped write this brief, or gave money intended to fund its writing or submission. All counsel of record received timely notice and consented to the filing of this brief. This brief was entirely paid for by the Amici and or their attorneys. *See* S. Ct. R. 37.

2. The Henry J. Kaiser Family Foundation, *Population by Citizenship Status in 2015*, at Table 1 (2016) http://kff.org/other/state-indicator/distribution-by-citizenship-status/ (last visited, Oct. 4, 2016) (reporting on the population number of noncitizens in the United States which was 22,984,400 people).

offense" means that a parent, or teenage child, or other family breadwinner or caregiver will be "exile[d]" from the United States, and the defendant's family confronted with the prospect of permanent separation. App. 10a.

This Court has already recognized that counsel representing noncitizen defendants in criminal proceedings must advise their clients about the clear deportation consequences of taking a guilty plea. *Padilla v. Kentucky*, 559 U.S. 356 (2010). In reaching that holding, this Court recognized that deportation is a harsh and permanent penalty and that preserving family unity and ties to the United States will be the primary concern for many noncitizen defendants. *Id.* at 374. Given the realities of deportation, "preserving the client's right to remain in the United States may be more important to the client than any potential jail sentence." *Id.* at 368 (quoting *INS v. St. Cyr*, 533 U.S. 289, 322 (2001)).

Unfortunately, the instances of noncitizen defendants receiving deficient advice of counsel—even after making clear that their primary goal is avoiding deportation—is all too common. Lower courts are currently split on the remedy available to noncitizen defendants when their attorneys provide constitutionally deficient advice regarding the immigration consequences of a guilty plea. Under the *Strickland* test, some courts hold that noncitizen defendants lack the ability to vacate their plea if there is strong evidence of guilt. Pet. at 12-13. These courts deny the existence of cognizable prejudice even if there is undisputed evidence in individual cases that the noncitizen defendant would have exercised his or her constitutional right to go to trial had they known that a plea would result in mandatory deportation.

Amici submit this brief to highlight the practical—and moral—importance of resolving the prejudice question raised by the petition. *First*, the conflict is widespread and affects noncitizen defendants and their families throughout the nation, including in state courts, which are also divided on the prejudice question.

Second, the analysis of lower courts that deny relief in cases like Mr. Lee's misapprehends this Court's precedent. Their holding that it is irrational for a noncriminal defendant to go to trial—when proof of guilt is allegedly strong—rather than accept a plea that results in automatic deportation is *offensive*. It ignores the experience of thousands of defendants and families who have faced this dilemma, and who have made it clear that their predominant goal is taking every step possible, including the constitutionally protected step of insisting on a trial, to avoid deportation.

A narrow prejudice inquiry for deportation-related harms, one that uniquely burdens immigrant defendants and their families, also violates constitutional tradition. In almost every other context, courts recognize the overwhelming importance of family ties, and legal rules are designed to honor and protect family integrity as a core American value. *See, e.g.*, *Moore v. City of East Cleveland*, 431 U.S. 494, 503 (1977) ("Our decisions establish that the Constitution protects the sanctity of the family precisely because the institution of the family is deeply rooted in this Nation's history and tradition.")

It is a perverse result if noncitizen defendants and their families somehow have less protection because counsel provided constitutionally deficient advice about

deportation consequences in the first place. The Sixth Circuit below deemed Mr. Lee's desire to go to trial "a Hail Mary," pass. App. 4a. But that analysis ignores all that Mr. Lee, and similarly situated defendants have to lose, such as residence in the only country they have known since childhood and ability to be with their spouses, parents, and children. This Court should determine whether it is irrational as a matter of law for noncitizen defendants to insist on a trial, given the profound harm of taking a plea guaranteeing automatic deportation.

This is not an immigration question solely; the harms are also inflicted on American citizens, like Mr. Lee's elderly parents. The prejudice question invokes and tests our deepest moral commitments to family. And by denying relief, the Sixth Circuit and other courts threaten to undermine and unravel the important protections this Court imposed in *Padilla*. For all these reasons, amici urge the Court to grant the petition and clarify the relief available to Mr. Lee and other noncitizen defendants raising similar Sixth Amendment claims.

ARGUMENT

I. The petition raises issues of nationwide scope, and conflicting state high court decisions underscore the importance of granting review.

As the petition points out, federal circuits are deeply divided on the prejudice question raised in this case. *See* Pet. 12-20. The conflict extends even broader however. State courts are the most common forum for ineffective assistance of counsel claims. Yet state high courts are also split on the issue of when the deportation consequences

of a guilty plea establish prejudice. Some state courts have adopted a narrow definition of prejudice like the Sixth Circuit below—deeming the harms of mandatory deportation irrelevant if the court finds strong evidence of guilt. *See Segura v. State*, 749 N.E.2d 496, 505 (Ind. 2001) (reasoning that because defendant failed to show "that if counsel had performed flawlessly a conviction would not have resulted from a trial or a different penalty would have been imposed," he did not satisfy the prejudice prong); *Bahtiraj v. State*, 840 N.W.2d 605, 611-12 (N.D. 2013) (holding that defendant failed to satisfy the prejudice prong where strong evidence of guilt indicated that a reasonable defendant would not have gone to trial regardless of deportation consequences).

Other state high courts have adopted a broader prejudice test, recognizing that mandatory deportation can constitute prejudice for a noncitizen defendant, like Mr. Lee, even if there is strong evidence that the defendant committed the charged offense. *See Commonwealth v. Lavrinenko*, 38 N.E.3d 278, 291-92 (Mass. 2015) (holding that a defendant's familial ties, longtime legal residence status, and lack of connection to his native country are special circumstances that support the conclusion that the defendant would have placed "particular emphasis on immigration consequences in deciding whether to plead guilty"); *Zemene v. Clarke*, 768 S.E.2d 684, 691-92 (Va. 2015) (holding that a defendant could rationally decide to go to trial despite strong evidence against him); *State v. Sandoval*, 249 P.3d 1015, 1022 (Wash. 2011) (en banc) (holding that it was rational for the defendant to take his chances at trial given that deportation would separate him from his family and force him to leave the country he made his home); *cf. People v. Peque*, 980 N.Y.S.2d 280, 301-02 (N.Y. 2013) (weighing prejudice in analogous due

process context by looking to harms of deportation and defendant's ties to the United States, not just the strength of the prosecution's case).

These conflicting state court decisions further confirm that the issue presented is of national importance and that guidance from this Court is crucial. *See* Sup. Ct. R. 10(a) (one of the "compelling reasons" for certiorari is when "a United States court of appeals . . . has decided an important federal question in a way that conflicts with a decision by a state court of last resort"). The diverging federal and state decisions show that Mr. Lee's case is not an isolated problem. Noncitizen defendants throughout the country continue to receive deficient advice about the deportation consequences of taking a guilty plea, and the question of when prejudice ensues has divided courts and judges.

For the families and communities that amici serve, this has profound consequences. No family is immune, for example, from the heroin and opioid epidemics sweeping the nation.[3] But for immigrant families with noncitizen

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3. U.S. Department of Health & Human Services, *The Opioid Epidemic: By the Numbers*, 1, http://www.hhs.gov/sites/default/files/Factsheet-opioids-061516.pdf (last visited Oct. 10, 2016) ("Our nation is in the midst of an unprecedented opioid epidemic."); *see also* Katharine Q. Seelye, *In Heroin Crisis, White Families Seek Gentler War on Drugs*, The New York Times (Oct. 30, 2015), *available at* http://www.nytimes.com/2015/10/31/us/heroin-war-on-drugs-parents.html (explaining how "heroin use has climbed among all demographic groups" and how heroin addiction is affecting more families all across the nation); *see also, e.g.*, Maddie McGarvey, *Ravages of Heroin Addiction Haunt Friends, Families and Whole Towns*, NPR (Aug. 23, 2015), *available at* http://www.npr.org/2015/08/23/433575293/ravages-of-heroin-addiction-haunt-

members, the potential cost of an encounter with the criminal justice system is mandatory deportation, a particularly harsh and permanent penalty. Families in jurisdictions that recognize a narrow prejudice rule effectively lose one of the most important—and only—tools they have to try and keep their families together: asking counsel to pursue all options in criminal proceedings to avoid deportation. In a case like Mr. Lee's, that means that a noncitizen defendant could tell counsel multiple times that he cares most about remaining in the United States with his family, and also specifically seek reassurance from counsel when agreeing to a plea that he will not be deported (Pet. at 6-7; App. at 57a), yet still lose the right to go to trial because his attorney gives affirmatively incorrect advice.

Large numbers of families are affected by current divide among lower federal and state courts. Over 4.3 million noncitizens live in the Fifth and Sixth Circuits alone,[4] two circuits that apply a narrow prejudice rule. *See* Pet. at 12-13. The states within these circuits, such as Texas and Tennessee, are also home to some of the most rapidly growing immigrant populations in the United States.[5]

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friends-families-and-whole-towns (explaining nation-wide scope and personal toll on families from heroin addiction crisis).

4. The Henry J. Kaiser Family Foundation, *Population by Citizenship Status in 2015*, at Table 1 (2016) http://kff.org/other/state-indicator/distribution-by-citizenship-status/ (last visited, Oct. 4, 2016) (reporting that more than 4.3 million noncitizens reside in the states of Kentucky, Louisiana, Michigan, Mississippi, Ohio, Tennessee, and Texas).

5. *See* American Immigration Council, *New Americans in Tennessee*, https://www.americanimmigrationcouncil.org/sites/

And the impact on families is not confined by circuit or state boundaries. Noncitizen defendants like Mr. Lee can be prosecuted in a different jurisdiction than where they or their families live. In this case, for example, Mr. Lee's parents reside in Queens, New York. The Second Circuit would recognize potential prejudice in Mr. Lee's case, *see* Pet. at 14-15, yet the Sixth Circuit would deny relief. The circuit split on prejudice has literally divided a family, with courts in one circuit considering a noncitizen defendant's "very strong ties to the United States" (App. at 10a) as potentially sufficient to establish prejudice, but courts in another finding those ties largely irrelevant if alleged strong evidence of guilt exists.

II. The question presented is important because a narrow prejudice rule improperly ignores the humanitarian harms of deportation.

Today, we are increasingly a nation of immigrants, and mixed families are common. Immigrant families often have both naturalized and unnaturalized family members. At least 13.1 million legal permanent residents[6]

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default/files/research/new_americans_in_tennessee_2015.pdf (last visited Oct. 4, 2016) (showing the growing share of the immigrant population in Tennessee making up a total 4.7% of the total state population in 2013 which was an increase of more than 50% compared to the share in 2000); *see also* American Immigration Council, *New Americans in Texas*, https://www.americanimmigrationcouncil.org/sites/default/files/research/new_americans_in_texas_2015.pdf (last visited Oct. 4, 2016) (demonstrating a rapid increase of over 80% in the immigrant population in the last three decades culminating in a total immigrant population of 4,369,271 in Texas alone).

6. Bryan Baker & Nancy Rytina, *Estimates of the Lawful Permanent Resident Population in the United States*: January

and over 11 million undocumented residents currently live in the United States.[7] When their loved ones and family are considered, even more people are affected by the threatened deportation of unnaturalized family members. To give just a few examples, in 2012, nearly one in five undocumented adult immigrants was married to a United States citizen or lawful permanent resident,[8] and there were over 3.8 million citizen children in the United States with undocumented parents.[9] Comparable data is not readily available for lawful permanent residents, but when their spouses and children are considered, similar high rates of mixed-status families likely exist.

Federal laws vastly expanding the scope of offenses resulting in mandatory deportation—and removing discretion from immigration judges to grant relief—have changed the stakes for the millions of immigrant and mixed families currently living in the United States.[10] These families now live with the looming risk of deportation when family members encounter the criminal

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2013, at 3 (2014), https://www.dhs.gov/sites/default/files/publications/ois_lpr_pr_2013_0.pdf.

7. The Pew Ctr., *5 Facts About Illegal Immigration In The U.S.* (2016), http://www.pewresearch.org/fact-tank/2016/09/20/5-facts-about-illegal-immigration-in-the-u-s/.

8. *See* Ctr. for Am. Progress, *The Facts on Immigration Today*, https://www.americanprogress.org/issues/immigration/report/2014/10/23/59040/the-facts-on-immigration-today-3/#population (last visited Oct. 4, 2016).

9. *Id.*

10. *See, e.g.*, 8 U.S.C. §§ 1227(a)(2), 1229b(a)(3).

justice system.[11] And thousands of families have been torn apart due to criminal convictions. In 2015, for example, the United States Immigration and Customs Enforcement ("ICE") deported approximately 140,000 noncitizens with prior criminal convictions.[12] Recent data shows that a substantial percentage of annual deportations are for drug-related offenses, many for possession of marijuana.[13]

For affected families, deportation has profound consequences:

- Loss of a breadwinner can force families into poverty;
- Married partners lose the ability to live with their spouse;
- Parents are separated from children, causing psychological and emotional trauma to children remaining in the United States;[14]

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11. *See* Bryan Lonegan, *American Diaspora: The Deportation of Lawful Residents from the United States and the Destruction of Their Families*, 32 N.Y.U. Rev. L. & Soc. Change 55, 60 (2007); Nancy Morawetz, *Understanding the Impact of the 1996 Deportation Laws and the Limited Scope of Proposed Reforms*, 113 Harv. L. Rev. 1936, 1936 (2000).

12. U.S. Dep't Homeland Sec., ICE Enforcement and Removal Operations Report 8 (2015), https://www.ice.gov/sites/default/files/documents/Report/2016/fy2015removalStats.pdf.

13. Drug Policy Alliance, *The Drug War and Mass Deportation*, 1 (Feb. 2016), https://www.drugpolicy.org/resource/drug-war-and-mass-deportation.

14. *See* Lonegan, *supra*, at 71. (at least 86% of the children affected by a deported mother or father are U.S. citizens); Int'l Human Rights Law Clinic, *supra*, at 4.

The toll of deportation on family members is substantial. Studies show that 70% of family members and deportees exhibit symptoms of post-traumatic stress disorder. Lonegan, *supra*, at 72 ("The most prevalent symptoms experienced . . . were hopelessness/despair, sadness, shock and fear.") (internal citation omitted).

Deportation also imposes enormous harms on noncitizen defendants forced to leave the United States. Deportees may not speak the native language of their birth country, and they may have no practical ability to make a living in their new, forced home. The difficulties of deportation are compounded when the deportee lacks connections to the people and culture of his or her country of origin. Conditions in their home country may also be dangerous or hostile, a factor of special concern for individuals who came to United States as refugees.

Many noncitizen defendants, like Mr. Lee, immigrated to America as children, making the United States the only home they have ever known. The shock and trauma of deportation, for those defendants, is little different than if an American citizen living in the United States their whole lives were suddenly separated from their family and exiled to their family's ancestral country of origin.

For the courts that focus on proof of guilt, all of these harms are irrelevant if strong proof of guilt is found. But that one-sided approach is inconsistent with this Court's long recognition of the devastating humanitarian consequences of deportation. *See I.N.S. v. St. Cyr*, 533 U.S. at 323; *Bridges v. Wixon*, 326 U.S. 135, 164 (1945) ("[T]he impact of deportation upon the life of an alien is often as great, if not greater, than the imposition of a criminal sentence. A deported alien may lose his family,

his friends and his livelihood forever. Return to his native land may result in poverty, persecution and even death.").

To avoid these harms, a criminal defendant has the constitutional right to demand a trial and to reject a guilty plea even if proof of guilt is overwhelming. *See, e.g.*, *Jones v. Barnes*, 463 U.S. 745, 751 (1983) ("the accused has the ultimate authority to make certain fundamental decisions regarding the case, [such] as . . . whether to plead guilty"); *DeBartolo*, 790 F.3d at 778. A narrow prejudice rule, however, effectively denies noncitizen defendants of this core right. An attorney's incompetent advice bars defendants from exercising their constitutional right to demand a trial when a court find strong proof of guilt, a factor that would be irrelevant if counsel had provided accurate advice.

This perverse result lacks support in this Court's precedent. This Court's prior decisions do not limit prejudice to what can be *gained* at trial rather than what is *lost* from a fundamentally misinformed plea. Even if a noncitizen defendant is unlikely to prevail at trial, he has a rational interest in preserving all of his rights. By rejecting a plea, the defendant can pursue other avenues for relief, including negotiating for an alternative plea to a non-deportable offense, *see* Pet. at 20-22. Even if those possibilities are slim and a trial may result in a longer sentence, it would still be rational to pursue other options given the known certainty and harm of pleading guilty to an offense that will result in mandatory deportation. *See United States v. Orocio*, 645 F.3d 630, 645 (3d Cir. 2011); *DeBartolo v. United States*, 790 F.3d 775, 780 (7th Cir. 2015).[15]

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15. State courts have also recognized that it is rational for noncitizen defendants to avoid the known and certain harm of a

Moreover, this Court has also made clear that the relevant prejudice inquiry is guided by "fundamental fairness," not by "mechanical rules" like a test that automatically discounts the harms of deportation when strong proof of guilt is present. *Strickland*, 466 U.S. at 696. At a minimum, the conflict over the correct prejudice test for defendants like Mr. Lee merits this Court's review and resolution.[16]

This is the rare and unusual case where courts and judges throughout the nation are intractably divided over when it is "rational" for defendants to demand a trial given the overwhelming harms of mandatory deportation. The narrow version the *Strickland* prejudice test is also overwhelmingly harmful to immigrant families and communities. The importance of family is deeply embedded in American law, *see supra* at 3, yet when deportation and permanent family separation are at stake, courts like the Sixth Circuit deem it irrational for noncitizen defendants to put their family ties first in deciding whether to take a guilty plea.

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plea leading to mandatory deportation, regardless of whether the defendant can demonstrate a likelihood of success at trial. *See, e.g.*, *Padilla v. Commonwealth*, 381 S.W.3d 322, 329 (Ky. Ct. App. 2012); *People v. De Jesus*, 935 N.Y.S.2d 464, 473 (N.Y. App. Div. 2011); *People v. Guzman*, 24 N.E.3d 831, 841-42 (Ill. App. Ct. 2014) (McDade, J.).

16. Clarification will also be helpful for prosecutors. The government in Mr. Lee's case, for example, initially conceded that prejudice had been established (App.75a). Clear cases of ineffective assistance may be resolved by government consent to vacate prior pleas without protracted litigation. Thus, providing guidance to prosecutors—on a question that caused confusion and a switch in position in Mr. Lee's own case—will be beneficial and avoid burdening courts.

The continued application of a narrow prejudice test further invites profound and irreparable error. Rather, than a case specific, and flexible prejudice inquiry, as this Court intended, *Strickland*, 466 U.S. at 696, courts are encouraged to ignore cultural and individual factors and look only to proof of guilt as the main determinant of the prejudice inquiry. The importance of specific cultural concerns—such as the importance of family within Mr. Lee's South Korean culture, and the expectation that children will care for and support elderly parents, will not be relevant. Jingyuan Ma & Mel Marquis, *Business Culture in East Asia and Implications for Competition Law*, 51 TEX. INT'L L.J. 1, 7-9, 14 (2016). As a result, courts will not consider Mr. Lee's desire to ensure that his elderly parents are cared for in their old age. Mr. Lee's three decades of residence in the United States, as well as the fact that he was a friend, boyfriend, boss, and small business owner within his Tennessee community, and "a productive member of society" also have no weight (App. 10a).

For Mr. Lee and others in his shoes, it is not irrational to exhaust every option and to risk going to trial to avoid the certain harm of exile from the United States and permanent separation from their families. This Court should resolve the conflict among the lower courts and clarify how the *Strickland* prejudice test applies in cases involving mandatory deportation.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

APPENDIX — LIST OF *AMICI CURIAE*

Asian Americans Advancing Justice | AAJC is a national nonprofit organization founded in 1991. Based in Washington D.C., Advancing Justice | AAJC works to advance and protect civil and human rights for Asian Americans and to build and promote a fair and equitable society for all. Advancing Justice | AAJC is one of the nation's leading experts on issues of importance to the Asian American community, including immigration and immigrants' rights. Along with our Advancing Justice affiliates, Advancing Justice | AAJC works to promote justice and bring national and local constituencies together through community outreach, public policy advocacy, and litigation.

Asian American Community Services (AACS) is a community-based organization in Central Ohio that seeks to improve the well-being and quality of life of Asian/Pacific Islanders through a broad range of social services, education, and community outreach. Every day, we work to address the various social, linguistic, cultural, and other barriers faced by our clients who consist largely of immigrants and children/grandchildren of immigrants. We understand the critical need to ensure that the civil rights of all immigrants are respected.

Americans for Immigrant Justice ("AI Justice"), formerly Florida Immigrant Advocacy Center, is a non-profit law firm dedicated to promoting and protecting the basic rights of immigrants. Since our founding in 1996, AI Justice has served over 90,000 immigrants from all over the world. Our clients are unaccompanied immigrant

children; survivors of domestic violence, sexual assault, and human trafficking and their children; immigrants who are detained and facing removal proceedings; and immigrants seeking assistance with work permits, legal permanent residence, asylum and citizenship. Our clients also include individuals who have been convicted of criminal offenses, some of whom were provided mistaken legal advice regarding the effects of guilty pleas on their immigration status by former counsel, subjecting them to removal. The issue presented in this matter directly affects part of the population we serve. Part of our mission is to ensure that immigrants are treated justly, and to help bring about a society in which the contributions of immigrants are valued and encouraged. In Florida and on a national level, we champion the rights of immigrants; serve as a watchdog on immigration detention practices and policies; and speak for immigrant groups who have particular and compelling claims to justice.

Asian Services In Action (ASIA) is the largest Asian American & Pacific Islander (AAPI)-focused health and social service non-profit agency in the state of Ohio. For over 20 years, ASIA has taken on the most challenging tasks to help the underserved, low-income, refugee and immigrant communities. ASIA's mission is to empower and advocate for Asian Americans & Pacific Islanders (AAPIs); and to provide AAPIs and other communities with access to health and social services, and culturally and linguistically appropriate information.

The **Asia Law Alliance (ALA)** is a non-profit law office founded in 1977 by law students from Santa Clara

University School of Law. ALA's mission is to provide equal access to the justice system to Asian and Pacific Islanders and low income residents of Santa Clara County. ALA provides legal services in the areas of public benefits, civil rights, domestic violence, landlord and tenant law and immigration law. ALA has a long history of advocating for the civil and legal rights of immigrants.

The **Coalition for Humane Immigrant Rights of Los Angeles (CHIRLA)** is an organization with statewide presence in California and national recognition. Our mission is to advance the human, civil rights, and full integration of New Americans and their children into the fabric of our society. CHIRLA advocates on behalf of this community through policy and advocacy, organizing, education, and community building.

The **Fred T. Korematsu Center for Law and Equality (Korematsu Center)** is a non-profit organization based at Seattle University School of Law and works to advance justice through research, advocacy, and education. The Korematsu Center is dedicated to advancing the legacy of Fred Korematsu, who defied the military orders during World War II that ultimately led to the internment of 110,000 Japanese Americans. He took his challenge of the military orders to the United States Supreme Court, which upheld his conviction in 1944 on the ground that the removal of Japanese Americans was justified by "military necessity." Fred Korematsu went on to successfully challenge his conviction and to champion the cause of civil liberties and civil rights for all people. The Korematsu Center, inspired by his example, works to

advance his legacy by promoting social justice for all. It has a special interest in promoting fairness in the courts of our country. That interest includes ensuring effective assistance of counsel, especially when legal advice is given that has consequences relating to the detention or removal of individuals, many of whom have extensive ties to the United States. The Korematsu Center does not, in this brief or otherwise, represent the official views of Seattle University.

The **Illinois Coalition for Immigrant and Refugee Rights (ICIRR)** is a non-profit, nonpartisan statewide organization dedicated to promoting the rights of immigrants and refugees to full and equal participation in the civic, cultural, social, and political life of our diverse society. In partnership with our member organizations, the Coalition educates and organizes immigrant and refugee communities to assert their rights; promotes citizenship and civic participation; monitors, analyzes, and advocates on immigrant-related issues; and, informs the general public about the contributions of immigrants and refugees. ICIRR has advocated for policy changes that protect immigrant families from deportation and separation, and uphold their rights to due process and equal protection under the law.

The **National Asian Pacific American Bar Association (NAPABA)** is the national association of Asian Pacific American attorneys, judges, law professors, and law students, representing the interests of nearly seventy five state and local Asian Pacific-American bar associations and nearly 50,000 attorneys who work in

solo practices, large firms, corporations, legal services organizations, nonprofit organizations, law schools, and government agencies. Since its inception in 1988, the National Asian Pacific American Bar Association has served as the national voice for Asian Pacific Americans in the legal profession and has promoted justice, equity, and opportunity for Asian Pacific Americans. The National Asian Pacific American Bar Association advocates for the rights of immigrants and a fair and function court system, including clarifying the appropriate duties of counsel.

The **National Council of Jewish Women (NCJW)** is a grassroots organization of 90,000 volunteers and advocates who turn progressive ideals into action. Inspired by Jewish values, NCJW strives for social justice by improving the quality of life for women, children, and families and by safeguarding individual rights and freedoms. NCJW's Resolutions state that NCJW resolves to work for "Comprehensive, humane, and equitable immigration, refugee, asylum, and naturalization laws, policies, and practices that facilitate and expedite legal status and a path to citizenship for more individuals."

OCA - Asian Pacific Americna Advocates is a national, membership-driven organization dedicated to advancing the social, political, and economic wellbeing of Asian Pacific Americans. Through its 100 chapters and affiliates across the nation, OCA engages in policy advocacy, community organizing, and programming to advance the civil rights of Asian Pacific Americans, including immigrant rights and immigrant integration.

Appendix

South Asian Americans Leading Together (SAALT) is a national, nonpartisan, non-profit organization that elevates the voices and perspectives of South Asian individuals and organizations to build a more just and inclusive society in the United States. SAALT is the only national, staffed South Asian organization that advocates for South Asian communities through a social justice framework. SAALT has been a national voice in addressing immigrant rights. The South Asian community includes many who are non-citizens and vulnerable to prejudicial and discriminatory practices within the judicial system that may result in mandatory deportation without fair due process. We and our colleagues who join this brief believe that non-citizen defendants should have accurate legal advice about deportation consequences. We stand with Lee in the pursuit of protecting the rights of immigrants and their families.

The **Southeast Asia Resource Action Center (SEARAC)** is a national organization that advances the interests of Cambodian, Laotian, and Vietnamese American communities who came to this country as the largest group of refugees ever resettled in the United States. Due to challenges upon initial resettlement, SEARAC's communities have historically struggled with high rates of poverty, post-traumatic stress disorder, and poor educational outcomes, funneling many young people into the prison-to-deportation pipeline. SEARAC has been an outspoken advocate in the movement to end unjust, mandatory detention and deportation. We strongly believe in a judicial system that ensures due process for **all** immigrants and refugees, and join our colleagues

in this amicus brief in support of stronger legal protections for the most marginalized communities.

Tennessee Immigrant and Refugee Rights Coalition (TIRRC) is a statewide coalition of immigrants, refugees, and allies working to lift up fundamental American freedoms and human rights and build a strong, welcoming, and inclusive Tennessee. TIRRC supports the request for the Court to grant Mr. Lee's petition for review and to hear his case. Many of our members may be impacted by the narrow prejudice rule that has been adopted by the Sixth Circuit Court of Appeals that would deny relief to non-citizen defendants like Mr. Lee, even if they can prove that their attorneys provided ineffective assistance.

The **Texas Civil Rights Project (TCRP)** uses legal advocacy to empower communities and create policy change in Texas. In its twenty-five year history, TCRP has brought thousands of strategic lawsuits, defending voting rights, fighting institutional discrimination, and reforming systems of criminal justice. TCRP's efforts have helped countless low-income and historically marginalized Texans, including immigrant families. Recently, for example, TCRP settled a lawsuit against the State of Texas for refusing to issue birth certificates to babies born in Texas to undocumented mothers, representing dozens of immigrant families from the Rio Grande Valley and the organization La Unión del Pueblo Entero, and working with Texas Rio Grande Legal Aid. Without birth certificates, families lived in constant fear of separation and could not receive access to basic education, health, religious and childcare services. Given our history, mission

and dedication to advancing equality and justice, TCRP has a strong interest in seeing Mr. Lee's rights vindicated for his own benefit and for that of millions of immigrants and their families throughout the country.

AND
BRIEFS

No. 16-327

In The
Supreme Court of the United States

JAE LEE,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

**On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Sixth Circuit**

BRIEF OF *AMICUS CURIAE* CENTER ON THE ADMINISTRATION OF CRIMINAL LAW IN SUPPORT OF PETITIONER

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TABLE OF CONTENTS

TABLE OF AUTHORITIES.....ii

INTEREST OF THE *AMICUS CURIAE*.....1

SUMMARY OF THE ARGUMENT.....2

ARGUMENT.....2

I. The Sixth Circuit's rule gives insufficient deference to the goal of maintaining the adversarial process during plea bargaining....2

II. The significant circuit split on this issue will have wide-ranging practical ramifications until it is resolved.....7

CONCLUSION.....10

TABLE OF AUTHORITIES

Constitutional provision

U.S. Const. amend. VI.....3, 4, 5, 9

Cases

Hill v. Lockhart,
474 U.S. 52 (1985).....2

Lafler v. Cooper,
132 S. Ct. 1376 (2012).....3, 4, 6

Missouri v. Frye,
132 S. Ct. 1399 (2012).....4-5

Padilla v. Kentucky,
559 U.S. 356 (2010).....4

Strickland v. Washington,
466 U.S. 668 (1984).....2, 3, 6, 7, 9

United States v. Cronic,
466 U.S. 648 (1984).....5

Statutes

8 U.S.C. § 1101(a)(43)(B).....7

8 U.S.C. § 1101(a)(48)(A).....8

8 U.S.C. § 1182(a)(9)(A).....8

8 U.S.C. § 1182(h).....7

8 U.S.C. § 1228.....7

18 U.S.C. § 924(c).....7

21 U.S.C. § 802.....7

21 U.S.C. § 841(a)(1).....8

Other authorities

Immigration Consequences of Criminal Convictions: Padilla v. Kentucky (Office of Immigration Litigation, Department of Justice, Civil Division 2010).....7

United States Sentencing Commission, *Statistical Information Packet – Fiscal Year 2015*.....8

The Center on the Administration of Criminal Law ("the Center) respectfully submits this amicus curiae brief in support of Petitioner in this case.[1]

INTEREST OF THE *AMICUS CURIAE*

The Center, based at New York University School of Law,[2] is dedicated to defining and promoting good government practices in the criminal-justice system through academic research, litigation, and formulating public policy. One of the Center's guiding principles in selecting cases to litigate is identifying those that raise substantial legal issues regarding interpretation of the Constitution, statutes, regulations, or policies. The Center supports challenges to practices that raise fundamental questions of defendants' rights or that the Center believes constitute a misuse of government resources in view of law-enforcement priorities. The Center also defends criminal-justice practices where discretionary decisions align with applicable law and standard practices and are consistent with law-enforcement priorities.

The Center's appearance as amicus curiae in this case is prompted by its belief that it is important

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[1] Counsel for all parties received timely notice of intent to file this amicus curiae brief and consented to its filing; their consent letters are being filed with this brief. No counsel to any party authored this brief in whole or in part, and no person or entity other than Amicus, its members, and its counsel made a monetary contribution intended to fund the preparation or submission of this brief.

[2] No part of this brief purports to represent the views of New York University School of Law, or of New York University, if any.

to have uniformity among the circuits on this point: whether an alien defendant who pleads guilty to an offense that will result in mandatory, permanent deportation, in the face of strong evidence of guilt, is barred from establishing prejudice under *Strickland v. Washington*, 466 U.S. 668 (1984), and thus, ineffective assistance of counsel.

SUMMARY OF THE ARGUMENT

The rule applied by the Sixth Circuit and three others gives insufficient weight to the importance of safeguarding the adversarial process throughout the plea-bargaining stage of proceedings. It also widens a stark circuit split that will have broad practical ramifications if not addressed by this Court.

ARGUMENT

I. The Sixth Circuit's rule gives insufficient deference to the goal of maintaining the adversarial process during plea bargaining.

To show prejudice under the second prong of *Strickland v. Washington*, 466 U.S. 668 (1984) and establish ineffective assistance of counsel in connection with a guilty plea, a petitioner must show "a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial." *Hill v. Lockhart*, 474 U.S. 52, 59 (1985). In applying that standard, the Sixth Circuit held that Mr. Lee faced "overwhelming evidence" of guilt, had no "*bona fide* defense, not even a weak one," and could not show that an attempt by competent counsel to negotiate a plea to a non-

deportable offense "would have changed the ultimate outcome of his case." Pet. App. 10a, 8a. The court thus held that Mr. Lee had not shown that even if he had effective counsel, rejecting the plea would have had a reasonable probability of producing a different result, and therefore would have been rational under the circumstances. Pet. App. 4a.

However, that ruling fails to give adequate weight to this Court's admonition that "the benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the *adversarial process* that the trial cannot be relied on as having produced a just result." *Strickland*, 466 U.S. at 686 (emphasis added). The probability that counsel's deficient performance affected the proceeding's result undeniably is an important consideration in the prejudice analysis. But a breakdown in the adversarial process leading to that result can make the result unreliable and unjust, even if there is a significant amount of incriminating evidence that makes going to trial unlikely to be successful.

The importance of the adversarial process is demonstrated by *Lafler v. Cooper*, 132 S. Ct. 1376 (2012), where defendant rejected a favorable plea agreement after heeding the uninformed advice of counsel. *Id.* at 1384. At trial, he was convicted and sentenced to a significantly more severe term of imprisonment than the one proposed in the rejected plea agreement. *Id.* Opposing habeas relief, Michigan argued that the defendant could not show prejudice since "the purpose of the Sixth Amendment is to ensure the reliability of a conviction following a trial,"

and that, because the evidence had been weighed by a jury and determined to indicate his guilt beyond a reasonable doubt, the reliability of his conviction could not be doubted. *Id.* at 1388. This Court summarized that argument as an assertion that "[a] fair trial wipes clean any deficient performance by defense counsel during plea bargaining," *Id.*, and rejected it. As this Court explained, "[t]he fact that respondent is guilty does not mean he was not entitled by the Sixth Amendment to effective assistance or that he suffered no prejudice from his attorney's deficient performance during plea bargaining." 132 S. Ct. at 1388. In other words, no matter how much evidence prosecutors marshal against a defendant, he still may be prejudiced by ineffective assistance of counsel at the plea-bargaining stage, by giving up valuable rights and benefits he otherwise would have retained but for counsel's deficient performance.

Plea bargaining is a critical stage at which the Sixth Amendment's guarantee of effective assistance of counsel is implicated. *Padilla v. Kentucky*, 559 U.S. 356, 373 (2010). "Because ours 'is for the most part a system of pleas, not a system of trials,' it is insufficient simply to point to the guarantee of a fair trial as a backstop that inoculates any errors in the pretrial process." *Missouri v. Frye*, 132 S. Ct. 1399, 1407 (2012), quoting *Lafler*, at 132 S. Ct. at 1388. As this Court has explained, "horse trading between prosecutor and defense counsel determines who goes to jail and for how long. That is what plea bargaining is. It is not some adjunct to the criminal justice system; it *is* the criminal justice system." *Id.*

(emphasis in original; internal brackets and citations omitted). "In order that these benefits can be realized...criminal defendants require effective counsel during negotiations. Anything less might deny a defendant effective representation by counsel at the only stage when legal aid and advice would help him." *Id.* at 1407-08 (internal punctuation and citations omitted).

Maintenance of plea bargaining's adversarial component is essential to preserving the Sixth Amendment's promise of guaranteed effective assistance at critical stages. Indeed, "the adversarial process protected by the Sixth Amendment requires that the accused have counsel acting in the role of an advocate. ... But if the process loses its character as a confrontation between adversaries, the constitutional guarantee is violated." *United States v. Cronic*, 466 U.S. 648, 656-57 (1984) (internal citations omitted). As the Court has observed, "[w]hile a criminal trial is not a game in which the participants are expected to enter the ring with a near match in skills, neither is it a sacrifice of unarmed prisoners to gladiators." *Id.* at 657 (citation omitted).

In having an ineffective advocate during the plea-bargaining stage of his litigation, Mr. Lee was essentially sacrificed to the government's gladiators. In exchange for his plea, he surrendered "the right of the accused to require the prosecution's case to survive the crucible of meaningful adversarial testing." *Cronic*, 466 U.S. at 656. This is exemplified by the Sixth Circuit's very holding: while the court describes the evidence against Mr. Lee as

"overwhelming," none of it was subjected to the crucible of an adversary proceeding, which might have entailed any number of defensive and/or evidentiary strategies that might have weakened the prosecution's case.[3] Instead, Mr. Lee, by accepting the erroneous advice of his ineffective counsel, gave up his right to test the state's case in any of those ways. He also thus gave up the very means by which he might have undermined the "overwhelming evidence" against him – the same evidence cited in support of the notion that counsel's deficient performance did not prejudice his case.

Lafler teaches the importance of protecting the process. There, defendant demonstrated prejudice by showing that "as a result of not accepting the plea and being convicted at trial, [defendant] received a minimum sentence three and a half times greater than he would have received under the plea." *Lafler*, 132 S. Ct. at 1391. As a result of not accepting this plea, defendant lost a valuable benefit and suffered prejudice – prejudice not remedied by the reliability of the subsequent trial and evidence that convicted him. *Id.* at 1388 ("the question is not the fairness or reliability of the trial but the fairness and regularity of the *processes* that preceded it, which caused the defendant to lose benefits he would have received in the ordinary course but for counsel's ineffective assistance." (emphasis added)). Here, too, the rule foreclosing a showing of *Strickland* prejudice by one

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[3] Notably, despite judicial pronouncements of the "overwhelming" case against Mr. Lee, his (deficient) trial counsel characterized a potential personal-use defense to the trafficking charge as "difficult....[though] not impossible." Pet. App. 45a.

who pleads guilty in the face of "overwhelming" evidence, undermines the adversarial process by accepting that characterization of evidence that never will be tested.

II. The significant circuit split on this issue will have wide-ranging practical ramifications until it is resolved.

As the ruling below notes, the Sixth Circuit sides with three other circuits in holding that an alien criminal defendant facing "overwhelming" evidence of guilt would not rationally choose to go to trial – even where a guilty plea guarantees his removal from the only country he has ever known – and thus, cannot establish *Strickland* prejudice. Pet. App. 4a (citations omitted). That ruling further entrenches a circuit split this Court should address.

Illicit trafficking in a "controlled substance," including a "drug trafficking crime" as defined in 18 U.S.C. § 924(c), is an aggravated felony. 8 U.S.C. § 1101(a)(43)(B); 21 U.S.C. § 802. Generally, an alien convicted of an aggravated felony is statutorily ineligible for most forms of discretionary relief from removal, including cancellation of removal and asylum, and may be subject to expedited removal procedures. *Immigration Consequences of Criminal Convictions:* Padilla v. Kentucky (Office of Immigration Litigation, Department of Justice, Civil Division 2010), pg. 20, *citing* 8 U.S.C. § 1182(h), 8 U.S.C. § 1228. Further, an aggravated felon deportee is permanently barred from readmission to the United States unless the Attorney General has consented to the alien reapplying for admission. *Id.*,

citing 8 U.S.C. § 1182(a)(9)(A). For purposes of removal, a conviction includes pleas of guilty or nolo contendere, as well as admission of sufficient facts to warrant a finding of guilt, along with judicial imposition of punishment. 8 U.S.C. § 1101(a)(48)(A).

The circuit split the petition identifies exposes numerous alien defendants to potentially disparate outcomes, based purely on the happenstance of the circuit where he or she pleads guilty. For example, in 2015 a total of 19,479 guilty pleas were entered for drug-trafficking offenses in Federal district courts, including violations of 21 U.S.C. § 841(a)(1), the offense to which Mr. Lee plead guilty. United States Sentencing Commission, *Statistical Information Packet – Fiscal Year 2015*, collected by circuit at http://www.ussc.gov/research/data-reports/geography/federal-sentencing-statistics-2015 (accessed Oct. 11, 2016) (Table 3 – Guilty Pleas and Trials in Each Primary Offense Category). Of those, a combined 8,920 guilty pleas were entered in the courts of the Second, Fourth, Fifth, and Sixth circuits, which follow the rule the petition challenges. *Id.* Conversely, a combined 6,915 guilty pleas to drug-trafficking offenses were entered in the Third, Seventh, Ninth, and Eleventh circuits, which follow the contrary rule. *Id.* Undoubtedly, some aliens were among each group, and received ineffective assistance from their counsel in the process of accepting that plea. Those who chose to plea rather than stand trial in the face of "overwhelming" evidence of guilt might still be able to establish *Strickland* prejudice in the Third, Seventh, Ninth, and Eleventh circuits, but will be barred from doing so in the Sixth Circuit and the three others that agree with it. For this latter group,

their plea means automatic and permanent removal from the United States, despite ineffective assistance of counsel, and regardless of longstanding ties to this Nation such as those of Mr. Lee.

The Sixth Circuit both acknowledged the "growing circuit split" and stated that it does not intend to "change camps" on the issue. Pet. App. 4a-5a. If not reviewed, its decision will result in an enduring circuit split and inconsistent application of *Strickland*. Aliens who enter guilty pleas to deportable offenses based on erroneous advice from counsel will obtain relief, or be barred from it, based solely on the happenstance of the circuit in which that plea was entered. This Court's Sixth Amendment jurisprudence should not operate in such a patchwork and haphazard fashion.

CONCLUSION

The petition for a writ of certiorari should be granted.

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IN THE

Supreme Court of the United States

JAE LEE,

Petitioner,

v.

UNITED STATES,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF OF THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
INTEREST OF *AMICUS CURIAE*	1
SUMMARY OF ARGUMENT	2
ARGUMENT	2
CONCLUSION	9

TABLE OF AUTHORITIES

CASES Page

Crawford v. *Washington*, 541 U.S. 36 (2004) 4
Dean v. *Sullivan*, 118 F.3d 1170 (7th Cir. 1997) 8
Debartolo v. *United States*, 790 F.3d 775 (7th Cir. 2015) 3
Jones v. *Barnes*, 463 U.S. 745 (1983) (Brennan and Marshall, JJ. dissenting) 4
Kimmelman v. *Morrison*, 477 U.S. 365 (1986) 9
Miller UK Ltd. v. *Caterpillar, Inc.*, 17 F. Supp. 3d 711 (N.D. Ill. 2014) 5
Missouri v. *Frye*, 132 S. Ct. 1399 (2012) 6
People v. *Simpson*, No. BA097211 (Cal. Super. Ct. Oct. 3, 1995) 6
Rodriguez Rodriguez v. *Munoz Munoz*, 808 F.2d 138 (1st Cir. 1986) 8
Runnels v. *Hess*, 653 F.2d 1359 (10th Cir. 1981) 8
Strickland v. *Washington*, 466 U.S. 668 (1984) 6
United States v. *Flores-Mejia*, 759 F.3d 253 (3d Cir. 2014) (en banc) (Greenaway, Jr., Smith, Shwartz, and Sloviter, JJ. dissenting with whom Fuentes, J. joins in part) 8
United States v. *Orocio*, 645 F.3d 630 (3d Cir. 2011), *abrogated on other grounds by Chaidez* v. *United States*, 133 S. Ct. 1103 (2013) 5
United States v. *Pielago*, 135 F.3d 703 (11th Cir. 1998) 8

TABLE OF AUTHORITIES—continued

Page

United States v. *Reyes*, 102 F.3d 1361 (5th Cir. 1996) 8

Williamson v. *Reynolds*, 904 F. Supp. 1529 (E.D. Okla. 1995), *abrogated on other grounds by Nguyen* v. *Reynolds*, 131 F.3d 1340 (10th Cir. 1997) 4

Yates v. *United States*, 135 S. Ct. 1074 (2015) 4

COURT DOCUMENTS

Information, *State* v. *Zimmerman*, No. 1712F04573, 2012 WL 1207410 (Fla. Cir. Ct. Apr. 11, 2012) 7

Petition for Writ of Certiorari, *Lee* v. *United States*, No. 16-327 (S. Ct. Sept. 6, 2016) 3, 5, 8

OTHER AUTHORITIES

A Funny Thing Happened on the Way to the Forum (United Artists 1966)..... 6

ABA Standards for Criminal Justice: Prosecution and Defense Function (Am. Bar. Ass'n. 1993) 8

Adam Serwer, *Why George Zimmerman was acquitted*, MSNBC (July 14, 2013), http://www.msnbc.com/msnbc/why-george-zimmerman-was-acquitted 7

César Cuahutémoc García Hernández, *7 Cir: Migrant Defendants Entitled To Roll The Dice With A Jury* (July 16, 2015), http://crimmigration.com/2015/07/16/7-cir-migrant-defendants-entitled-to-roll-the-dice-with-a-jury/..... 3

TABLE OF AUTHORITIES—continued

Page

Chelsea J. Carter and Holly Yan, *Why this verdict? Five things that led to Zimmerman's acquittal*, CNN (July 15, 2013), http://www.cnn.com/2013/07/14/us/zimmerman-why-this-verdict 7

Dave Deluca, *On Oct. 3, 1995: O.J. is acquitted*, Buffalo News (Oct. 3, 2016), http://buffalonews.com/2016/10/03/oct-3-1995-o-j-aquitted/ 6

Robert Reinhold, *AFTER THE RIOTS; Judge Sets Los Angeles for Retrial of Officer in Rodney King Beating*, N.Y. Times (May 23, 1992), http://www.nytimes.com/1992/05/23/us/after-riots-judge-sets-los-angeles-for-retrial-officer-rodney-king-beating.html?pagewanted=all 7

Timothy Egan, *NOT GUILTY: THE JURY; One Juror Smiled; Then They Knew*, N.Y Times (Oct. 4, 1995), http://www.nytimes.com/1995/10/04/us/not-guilty-the-jury-one-juror-smiled-then-they-knew.html 6

Twelve Angry Men (United Artists 1957) ... 8

INTEREST OF *AMICUS CURIAE*[1]

The National Association of Criminal Defense Lawyers (NACDL) is a nonprofit voluntary professional bar association that works on behalf of criminal defense attorneys to ensure justice and due process for those accused of crime or misconduct. NACDL was founded in 1958. It has a nationwide membership of many thousands of direct members, and up to 40,000 with affiliates. NACDL's members include private criminal defense lawyers, public defenders, military defense counsel, law professors, and judges. NACDL is the only nationwide professional bar association for public defenders and private criminal defense lawyers. NACDL is dedicated to advancing the proper, efficient, and just administration of justice.

NACDL supports the petition in this case because the Sixth Circuit's position (and that of the Second, Fourth, and Fifth Circuits) reflects a fundamental misunderstanding of the role of appellate courts and would permit them to impermissibly speculate as to what choices criminal defendants might make had they been properly advised by their counsel with respect to deportation risks. Judicial reasoning about whether a defendant would have chosen to take his

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[1] In accordance with Supreme Court Rule 37, *amicus curiae* states that no counsel for a party authored this brief in whole or part, and no counsel or party made a monetary contribution to fund the preparation or submission of this brief. No person other than the *amicus curiae*, its members, and its counsel made any monetary contribution to its preparation and submission. Petitioner and Respondent have consented to the filing of this brief. Letters reflecting such consent have been filed with Clerk.

case to trial improperly usurps the defendant's fundamental right to a jury of his peers.

SUMMARY OF ARGUMENT

The importance of the question presented in this case is highlighted by three additional arguments. First, the Sixth Circuit's reasoning constitutes improper appellate intrusion into an area in which appellate courts have no business; namely, a defendant's decision whether or not to invoke the right to trial. The exercise of that right cannot be subject to a priori tests for rationality. Even if courts could impose such a test, the nature of our adversarial system makes rational assessment impossible. Second, our collective experience of "can't win" cases amply demonstrates that such cases can indeed be won based upon much more than "whimsy," "caprice," or "nullification." Finally, the Sixth Circuit's reasoning rests on a shop-worn claim that the result is necessary because otherwise defense counsel may act in bad faith. The Court should not countenance any such assumption that members of the bar and officers of the court would act contrary to their ethical duties.

ARGUMENT

1. An appellate court's speculation about whether a defendant would have accepted a plea deal in spite of unwarned deportation risks fallaciously begs the question at hand. It presumes that the dispositive factor for defendants in plea negotiations is the period of incarceration. Of course, other factors may have equal or greater weight, including the risk of deportation for a defendant who has spent his entire life in the United States. While "harmless error" tests allow appellate courts to speculate about the fact a rational trier of fact may have found, most judges "have very

limited experience with the high-risk decisions facing criminal defendants. Few have ever represented defendants and fewer still have ever sat in the position of a defendant."[2] Here the Sixth Circuit offered that there was "overwhelming evidence of Lee's guilt." Petition for Writ of Certiorari at 10, *Lee* v. *United States*, No. 16-327 (S. Ct. Sept. 6, 2016). But that would not make it "irrational" for a defendant to elect trial and risk a longer sentence in hopes of avoiding deportation. Indeed, it is inconsistent with any defendant's right to a fair trial for an appellate court to insist that a defendant would not have exercised that right.

The Seventh Circuit, by contrast, articulated at least four reasons why it would be rational for a criminal defendant like Mr. Lee to reject his plea deal. See *Debartolo* v. *United States*, 790 F.3d 775, 779-80 (7th Cir. 2015). First, it is entirely rational for a defendant to reject a plea deal that would make him "deportable" in order to use the leverage of a trial to negotiate a different deal on a charge that would not make one "deportable." See *id.* at 776-79. Second, it is rational to take a high risk on a longer prison term if the reward of a not guilty verdict is the ability to remain with his or her family and friends in the United States rather than forever being barred. Third, even if a defendant accepts the inevitability of a guilty verdict, that defendant might rationally choose a longer prison sentence in the United States over a shorter one with swifter deportation. Fourth, a defendant who risks a longer prison term might pin his hopes, however slim, on an intervening change in

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[2] César Cuahutémoc García Hernández, *7 Cir: Migrant Defendants Entitled To Roll The Dice With A Jury* (July 16, 2015), http://crimmigration.com/2015/07/16/7-cir-migrant-defendants-entitled-to-roll-the-dice-with-a-jury/.

the substance of immigration law or the priorities of enforcement officials.

The Sixth Circuit's reasoning begs the question in yet another way: It presumes that a defendant's only hope would be jury nullification. But our criminal justice system is an adversarial one and not a civil-law investigation by learned tribunal. At its core is the presumption of innocence and the further process involves a host of tests that go far beyond prosecutorial claims of proof. Dispositive motions may uncover constitutional or statutory issues previously considered to be foreclosed[3] and motions *in limine* may find new evidentiary flaws with incriminating evidence.[4]

The Sixth Circuit's myopic resort to "nullification" also ignores the human flaws in such a system, including a prosecutor's potential failure to investigate facts sufficiently or to present them properly. See *Jones* v. *Barnes*, 463 U.S. 745, 762 n.6 (1983) (Brennan and Marshall, JJ. dissenting) ("Furthermore, the relative skill of lawyers certainly makes a difference at the trial and pre-trial stages, when a lawyer's strategy and ability to persuade may do his client a great deal of good in almost every case, and when his failure to investigate facts or to present them properly may result in their being excluded altogether from the legal system's official conception of what the

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[3] *See Crawford* v. *Washington*, 541 U.S. 36 (2004) (key testimony excluded because it violated the Confrontation Clause); *Yates* v. *United States*, 135 S. Ct. 1074 (2015) (disposal of undersized fish did not qualify as destruction of a tangible object).

[4] *See Williamson* v. *Reynolds*, 904 F. Supp. 1529, 1554 (E.D. Okla. 1995), *abrogated on other grounds by Nguyen* v. *Reynolds*, 131 F.3d 1340 (10th Cir. 1997) (government's criminalist "admitted that hair comparisons are not absolute identifications like fingerprints").

"case" actually involves."). Most fundamentally, it ignores the reality that jurors following their instructions might take the prosecution's burden quite seriously and find that the highest burden in the law had not been met. Cf. *United States* v. *Orocio*, 645 F.3d 630, 643-44 (3d Cir. 2011), *abrogated on other grounds by Chaidez* v. *United States*, 133 S. Ct. 1103 (2013) (the "requirement that a defendant affirmatively show that he would [have] been acquitted in order to establish prejudice . . . is no longer good law.").

Nor is it proper for the Sixth Circuit to overlay "rationality" on the exercise of fundamental rights. Defendants may choose trial for any reason or for no reason. Likewise, defendants may invoke their right to counsel or the privilege against self-incrimination for any reason or no reason. For that matter, appellate courts are in no position to second-guess whether a defendant made a rational choice to talk to the police despite *Miranda* warnings. Certainly they have no authority to invalidate waivers of such rights on the ground that no rational defendant in that predicament would have done the same.

For all types of litigants, "there is no such thing as a sure winner . . . at trial" and "juries are inherently unpredictable." *Miller UK Ltd.* v. *Caterpillar, Inc.*, 17 F. Supp. 3d 711, 739–40 (N.D. Ill. 2014). Taking a case to trial may be more than just a "Hail Mary." See Petition for Writ of Certiorari at 11, *Lee* v. *United States*, No. 16-327. Instead, it may well represent a strategic choice to change the calculus of a case – from early plea negotiations, through mid-trial plea

negotiations even to post-verdict efforts.[5] It is a key part of criminal procedure that has nothing to do with "whimsy" or "caprice," and everything to do with putting the government to its proof. *Strickland* v. *Washington*, 466 U.S. 668, 695 (1984).

2. Funny things happen on the way to, and at, the forum.[6] The annals of criminal law are replete with unexpected developments and shocking results in the courtroom. In the case of O.J. Simpson,[7] the former NFL star was acquitted of the murders of his ex-wife, Nicole Brown-Simpson, and her friend, Ron Goldman in what is known as the "Trial of the Century." Dave Deluca, *On Oct. 3, 1995: O.J. is acquitted*, Buffalo News (Oct. 3, 2016), http://buffalonews.com/2016/10/03/oct-3-1995-o-j-aquitted/. Contrary to the "mountain of evidence," and certainly the opinion of much of the public and press, the jury was not convinced by the prosecution's case. Timothy Egan, *NOT GUILTY: THE JURY; One Juror Smiled; Then They Knew*, N.Y. Times (Oct. 4, 1995), http://www.nytimes.com/1995/10/04/us/not-guilty-the-jury-one-juror-smiled-then-they-knew.html.

Pre-trial perceptions of the strength of the prosecution's case were also upended by the result in *State* v.

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[5] *See Missouri* v. *Frye*, 132 S. Ct. 1399, 1407 (2012) ("[T]he plea-bargaining process is often in flux, with no clear standards or timelines . . .").

[6] *See, e.g.*, A Funny Thing Happened on the Way to the Forum (United Artists 1966) (the story of a slave named Pseudolus and his many efforts to win his freedom by helping his master court the girl next door).

[7] *See People* v. *Simpson*, No. BA097211 (Cal. Super. Ct. Oct. 3, 1995).

Zimmerman.[8] George Zimmerman, a neighborhood watch leader, shot and killed Trayvon Martin, an unarmed black teenager. See generally Adam Serwer, *Why George Zimmerman was acquitted*, MSNBC (July 14, 2013), http://www.msnbc.com/msnbc/why-george-zimmerman-was-acquitted. The acquittal engendered astonishment. Defense counsel was able to point out inconsistencies in the testimony of the prosecution's star witness, Rachel Jeantel. See Chelsea J. Carter and Holly Yan, *Why this verdict? Five things that led to Zimmerman's acquittal*, CNN (July 15, 2013), http://www.cnn.com/2013/07/14/us/zimmerman-why-this-verdict.

In *People* v. *Powell* four Los Angeles police officers were acquitted of excessive force charges in the beating of Rodney King at the conclusion of a high-speed car chase. The encounter was caught on tape by a bystander, George Holliday, and played for the world to see by the media. See generally Robert Reinhold, *AFTER THE RIOTS; Judge Sets Los Angeles for Retrial of Officer in Rodney King Beating*, N.Y. Times (May 23, 1992), http://www.nytimes.com/1992/05/23/us/after-riots-judge-sets-los-angeles-for-retrial-officer-rodney-king-beating.html?pagewanted=all. Post-trial analysis pointed not to nullification, but to the change in jury composition brought about by a change in venue. See *id.*

Even where "rational" results may be expected or hoped for, litigation is anything but foreseeable as these well known cases demonstrate. Defendants are fully aware of the uncertainty of the criminal justice process – and so is the government. That uncertainty alone may make an election to place one's fate in the

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[8] *See generally* Information, *State* v. *Zimmerman*, No. 1712F04573, 2012 WL 1207410 (Fla. Cir. Ct. Apr. 11, 2012).

hands of "twelve angry men" a rational one. In that fictional trial, Henry Fonda's character, Juror 8, explains in the jury room: "Nobody has to prove otherwise. The burden of proof is on the prosecution. The defendant doesn't even have to open his mouth. That's in the Constitution." Twelve Angry Men (United Artists 1957).

3. Finally, the instant case is important for another reason; namely the Sixth Circuit's presumption that appellate courts may speculate with regard to a defendant's exercise of trial rights because otherwise "competent defense counsel [may] decide in some cases that acting incompetently [and not informing defendants of deportation risks] is better." Petition Appendix at 9a, *Lee* v. *United States*, No. 16-327. Such reasoning, all too often expressed in judicial opinions,[9] flies in the face of the reality that defense counsel, like prosecutors, are officers of the court and are bound by a code of ethics. See ABA Standards for Criminal Justice: Prosecution and Defense Function, Standard 4-1.2(b) (Am. Bar. Ass'n. 1993).

Defense counsel must advise, communicate, and explain to the accused all developments and proposals in plea discussions. See *id.* at 4-6.2(a)-(b). These ethical standards prohibit defense counsel from knowingly, indeed strategically, not telling their clients that a criminal conviction could lead to their deportation. This Court has acknowledged as much,

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[9] *See, e.g.*, *United States* v. *Flores-Mejia*, 759 F.3d 253, 263 (3d Cir. 2014) (en banc) (Greenaway, Jr., Smith, Shwartz, and Sloviter, JJ. dissenting with whom Fuentes, J. joins in part); *United States* v. *Pielago*, 135 F.3d 703, 709 (11th Cir. 1998); *Dean* v. *Sullivan*, 118 F.3d 1170, 1172 (7th Cir. 1997); *United States* v. *Reyes*, 102 F.3d 1361, 1365 (5th Cir.1996); *Rodriguez Rodriguez* v. *Munoz Munoz*, 808 F.2d 138, 149 (1st Cir. 1986); *Runnels* v. *Hess*, 653 F.2d 1359, 1364 (10th Cir. 1981).

finding it "virtually inconceivable that an attorney would deliberately invite the judgment that his performance was constitutionally deficient." *Kimmelman* v. *Morrison*, 477 U.S. 365, 382 n.7 (1986). In this case, however, the Sixth Circuit has relied upon precisely this "virtually inconceivable" and pernicious assumption. NACDL urges this Court to grant review and to declare unsound, once and for all, judicial reasoning that rests on general assumptions of bad faith among members of the defense bar.

CONCLUSION

For the foregoing reasons, and those set forth in the petition for a writ of certiorari, the petition should be granted.

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PETITION FOR WRIT OF CERTIORARI FILED SEPTEMBER 6, 2016
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TABLE OF CONTENTS

Relevant Docket Entries from the United States District Court for the Western District of Tennessee Docket No. 2:09-cr-20011 1

Relevant Docket Entries from the United States District Court for the Western District of Tennessee Docket No. 2:10-cv-2698 2

Relevant Docket Entries from the United States Court of Appeals for the Sixth Circuit Docket No. 14-5369 4

Indictment (redacted) (Dkt. 2, No. 2:09-cr-20011) 5

Memorandum of Plea Agreement (Dkt. 21, No. 2:09-cr-20011) 6

Judgment (redacted) (Dkt. 27, No. 2:09-cr-20011) 9

Motion Pursuant to 28 U.S.C. § 2255 to Vacate Conviction and Sentence (Dkt. 1, No. 2:10-cv-2698) 15

- Movant's Appendix of Exhibits (Dkt. 1-1, PageID 63-64) 73
- Exhibit 3 – Government's Rule 16 Discovery Letter (Dkt. 1-1, PageID 67-72) 75
- Exhibit 4 – DEA Investigation Report (Dkt. 1-1, PageID 73-80) 83
- Exhibit 8 – Plea Change Hearing Transcripts (Dkt. 1-1, PageID 94-116) 98

Exhibit 9 – Sentencing Hearing Transcripts (Dkt. 1-1, PageID 117-137) 115

Exhibit 11 – Post-Sentencing Correspondence of Attorney Fitzgerald to Lee for Ins (Dkt. 1-1, PageID 150) 129

Exhibit 12 – Lee's Declaration (Dkt. 1-1, PageID 151-156) 130

(Amended) Motion under 28 U.S.C. § 2255 to Vacate, Set Aside, or Correct Sentence by a Person in Federal Custody (Dkt. 5, No. 2:10-cv-2698) 140

Transcript of Evidentiary Hearing (Dkt. 56, No. 2:10-cv-2698) 152

Judgment in a Civil Case (Dkt. 70, No. 2:10-cv-2698) 252

Notice of Appeal (Dkt. 71, No. 2:10-cv-2698) 253

The following opinions, orders, and reports have been omitted in printing this joint appendix because they appear on the following pages in the appendix to the Petition for a Writ of Certiorari:

August 6, 2013 District Court Report and Recommendation ..... Pet. App. 51a–77a

March 20, 2014 District Court Order ..... Pet. App. 11a–50a

June 8, 2016 Sixth Circuit Opinion ..... Pet. App. 1a-10a

RELEVANT DOCKET ENTRIES

United States District Court
Western District of Tennessee
No. 2:09-cv-20011

United States of America* v. *Jae Lee

Date Filed	No.	Docket Text
01/28/2009	2	Redacted Indictment as to Jae Lee. (jae) (Entered: 01/29/2009)
06/18/2009	21	PLEA AGREEMENT as to Jae Lee. (tpe) (Entered: 06/18/2009)
09/29/2009	27	REDACTED JUDGMENT as to Jae Lee (1), Count 1, 12 months and 1 day Incarceration; 3 years Supervised Release; $5000 Fine; $100 Special Assessment. Signed by Judge Bernice B. Donald on 9/29/09. (Donald, Bernice) (Entered: 09/29/2009)

RELEVANT DOCKET ENTRIES

United States District Court
Western District of Tennessee
No. 2:10-cv-2698

Jae Lee* v. *United States of America

Date Filed	No.	Docket Text
09/24/2010	1	PRO SE COMPLAINT - Motion Pursuant to 28 U.S.C. § 2255 to Vacate Conviction and Sentence filed by Jae Lee against United States of America. (Attachments: # 1 Movant's Appendix of Exhibits, # 2 Judicial Cards)(csf) (Entered: 09/24/2010)
10/28/2010	5	AMENDED Motion Under 28 U.S.C. § 2255 to Vacate, Set Aside or Correct Sentence filed by Jae Lee against United States of America.(csf) (Entered: 10/29/2010)
05/23/2013	56	NOTICE OF FILING OF OFFICIAL TRANSCRIPT of Proceedings held on February 9, 2012, Evidentiary Hearing before Judge Diane K. Vescovo. Court Reporter Lynn Dudley, Telephone number (901)525-1023. . . . (Dudley, Lynn) (Entered: 05/23/2013)

Date Filed	No.	Docket Text
03/20/2014	70	JUDGMENT re DE 69 ORDER. Signed by Judge John T. Fowlkes, Jr on 3/20/14. (Fowlkes, J.) (Entered: 03/20/2014)
03/31/2014	71	NOTICE OF APPEAL as to 69 Order on Report and Recommendations, 70 Judgment by Jae Lee. Appeal Record due by 4/18/2014. (McNally, Patrick) (Entered: 03/31/2014)

RELEVANT DOCKET ENTRIES

United States Court of Appeals
for the Sixth Circuit
No. 14-5369

Jae Lee* v. *United States of America

Date Filed	No.	Docket Text
06/08/2016	20	OPINION and JUDGMENT filed : The district court's denial of Lee's § 2255 motion to vacate his conviction and sentence is AFFIRMED. Decision for publication. Alan E. Norris, Alice M. Batchelder (AUTHORING), and Jeffrey S. Sutton, Circuit Judges. (CL)

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TENNESSEE
WESTERN DISTRICT

UNITED STATES OF AMERICA,	*	CR. NO. 09-20011
Plaintiff,	*	21 U.S.C. § 841(a)(1)
v.	*	
JAE LEE,	*	
a/k/a "Jae L. Williams",	*	
Defendant.	*	

INDICTMENT

THE GRAND JURY CHARGES:

COUNT ONE

On or about January 7, 2009, in the Western District of Tennessee, the defendant, **JAE LEE, a/k/a/ "Jae Williams"** did unlawfully, knowingly and intentionally possess with the intent to distribute a mixture and substance containing a detectable amount of controlled 3,4-methylenedioxymethamphetamine, commonly known as "MDMA" and/or "ecstasy," a controlled substance as classified by Title 21, United States Code, Section 812 as a Schedule I controlled substance, all in violation of Title 21, United States Code, Section 841(a)(1).

S/Grand Jury Foreperson
FOREPERSON

DATED: 1-28-2009

UNITED STATES ATTORNEY

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TENNESSEE
WESTERN DISTRICT

UNITED STATES OF AMERICA,	*	No. 09-20011-BBD
Plaintiff,	*	FILED IN
vs.	*	OPEN COURT
JAE LEE, a/k/a "Jae L. Williams,"	*	DATE: 6/17/09
	*	TIME: 10:46 AM
Defendant.	*	INITIALS: _____

MEMORANDUM OF PLEA AGREEMENT

The Defendant, JAE LEE, a/k/a "Jae L. Williams," through his attorney, Larry Fitzgerald, knowingly and voluntarily agrees with the United States, through the United States Attorney for the Western District of Tennessee, through the undersigned Assistant U.S. Attorney, to plead guilty to Count 1 of the above-numbered Indictment, charging the Defendant with a violation of 21 U.S.C. § 841(a)(1).

1. Pursuant to Rule 11(c)(1)(B) of the Federal Rules of Criminal Procedure and in consideration for the Defendant's plea of guilty, the Government and the Defendant will jointly recommend that the Defendant receive a three-level reduction for acceptance of responsibility under U.S. Sentencing Guidelines §3E1.1. The Defendant understands that if the Court does not accept these recommendations the Defendant nevertheless has no right to withdraw the plea. In addition, the Government will not object to a

finding that the Defendant qualifies under the safety valve provisions of 18 U.S.C. § 3553(f) and U.S.S.G. §5C1.2, provided that this Defendant has complied with the requirements for this reduction, including the following: (1) that he has no more than 1 criminal history point; and (2) no later than the time of sentencing, he has, in the Government's view, truthfully provided to the Government all information and evidence he has concerning the offenses charged in the Indictment in this case.

2. Neither the Government nor any law enforcement officer can or does make any promises or representations. as to what sentence will be imposed by the Court.

3. The Defendant understands that the accurate Sentencing Guidelines range must be taken into account by the Court before imposing a sentence, but that the Court is not bound by the Sentencing Guidelines and can impose any sentence within statutory limits.

4. Should it be judged by the Government that the Defendant has committed or attempted to commit any additional crimes or has engaged in any conduct constituting obstructing or impeding justice within the meaning of U.S. Sentencing Guidelines §3C1.1 or has failed to make any court appearances in this case, from the date of the Defendant's signing of this plea agreement to the date of the Defendant's sentencing, or if the Defendant attempts to withdraw his plea, the Government will be released from its obligations and would become free to argue for any sentence within statutory limits. Such a breach by the Defendant would not release the Defendant from this plea of guilty.

5. The Defendant further understands and agrees the special assessment is due and payable to the U.S. District Court Clerk's Office immediately following the Defendant's sentencing.

6. This writing contains the entire Plea Agreement between the Defendant and the Government with respect to his plea of guilty. No additional promises, representations or inducements other than those referenced in this Plea Agreement have been made to the Defendant or to his attorney with regard to this Plea, and none will be made or entered into unless in writing and signed by all parties.

_____ 06-17-09
JAE LEE Date
Defendant

_____ 6-17-09
LARRY FITZGERALD, ESQ. Date
Attorney for Defendant

LAWRENCE J. LAURENZI
UNITED STATES ATTORNEY

By _____ 6/17/09
ARUN G. RAO Date
Assistant U.S. Attorney

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TENNESSEE
MEMPHIS DIVISION

UNITED STATES OF AMERICA	**2:09CR20011-01-D (Redacted Version)**
-v-	**Larry E. Fitzgerald, Retained**
JAE LEE	**Defense Attorney 100 North Main Street, Suite 901 Memphis, TN 38103**

JUDGMENT IN A CRIMINAL CASE
(For Offenses Committed On or After November 1, 1987)

The defendant pleaded guilty to Count 1 of the Indictment on June 17, 2009. Accordingly, the court has adjudicated that the defendant is guilty of the following offense:

Title & Section	Nature of Offense	Date Offense Concluded	Count Number
21 U.S.C. § 841(a)(1)	Possession with the Intent to Distribute MDMA (Ecstacy)	01/07/2009	1

The defendant is sentenced as provided in the following pages of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984 and the Mandatory Victims Restitution Act of 1996.

IT IS FURTHER ORDERED that the defendant shall notify the United States Attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs and special assessments imposed by this judgment are fully paid.

Date of Imposition of Sentence:
September 28, 2009

s/ Bernice B. Donald
BERNICE B. DONALD
UNITED STATES DISTRICT JUDGE

September 29, 2009

Defendant's Date of Birth: 1969
Defendant's Soc. Sec. No. xxx-xx-6662
Deft's U.S. Marshal No.: 22715-076

Defendant's Mailing Address:

Cordova, TN

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a term of **12 Months and 1 Day**. (Delay Service of Sentence to after January 30, 2009.)

The Court recommends to the Bureau of Prisons:

– Placement at FPC Millington, Tennessee.

The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons as notified by the United States Marshal.

RETURN

I have executed this judgment as follows:

_____

_____

Defendant delivered on _____ to _____
at _____, with a certified copy of this judgment.

_____
UNITED STATES MARSHAL

By: _____
Deputy U.S. Marshal

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of **3 Years**.

The defendant shall report to the probation office in the district to which the defendant is released within 72 hours of release from custody of the Bureau of Prisons.

While on supervised release, the defendant shall not commit another federal, state or local crime and shall not possess a firearm, ammunition, or destructive device as defined in 18 U.S.C. § 921.

The defendant shall refrain from any unlawful use of a controlled substance. The defendant shall submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as directed by the probation officer.

The defendant shall comply with the following standard conditions that have been adopted by this court.

STANDARD CONDITIONS OF SUPERVISION

1. The defendant shall not leave the judicial district without the permission of the court or probation officer;
2. The defendant shall report to the probation officer as directed by the court or probation officer and shall submit a truthful and complete written report within the first five days of each month;
3. The defendant shall answer truthful all inquiries by the probation officer and follow the instructions of the probation officer;
4. The defendant shall work regularly at a lawful occupation unless excused by the probation officer for schooling, training, or other acceptable reasons;
5. The defendant shall notify the probation officer **ten(10) days prior** to any change in residence or employment;
6. The defendant shall refrain from the excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any narcotic or other controlled substance, or any paraphernalia related to such substances, except as prescribed by a physician, and shall submit to periodic urinalysis tests as directed by the probation officer to determine the use of any controlled substance;
7. The defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered; The defendant shall not associate with any persons engaged in criminal activity, and shall not associate with any

person convicted of a felony unless granted permission to do so by the probation officer;

8. The defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view by the probation officer;

9. The defendant shall notify the probation officer within **72 hours** of being arrested or questioned by a law enforcement officer;

10. The defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court;

11. As directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics, and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

12. If this judgment imposes a fine or a restitution obligation, it shall be a condition of supervised release that the defendant pay any such fine or restitution in accordance with the Schedule of Payments set forth in the Criminal Monetary Penalties sheet of this judgment.

ADDITIONAL CONDITIONS OF SUPERVISED RELEASE

The defendant shall also comply with the following additional conditions of supervised release:

1) Participate in substance abuse testing and treatment as directed by the Probation Officer.

2) Cooperate with DNA collection as directed by the Probation Officer.

CRIMINAL MONETARY PENALTIES

The defendant shall pay the following total criminal monetary penalties in accordance with the schedule of payments set forth in the Schedule of Payments. The defendant shall pay interest on any fine or restitution of more than $2,500, unless the fine or restitution is paid in full before the fifteenth day after the date of judgment, pursuant to 18 U.S.C. § 3612(f). All of the payment options in the Schedule of Payments may be subject to penalties for default and delinquency pursuant to 18 U.S.C. § 3612(g).

Total Assessment	Total Fine	Total Restitution
$100.00	$5000.00	

The Special Assessment shall be due immediately.

FINE

A Fine in the amount of $ 5000.00 is imposed.

RESTITUTION

No Restitution was ordered.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION

JAE LEE, Movant, v. UNITED STATES OF AMERICA Respondent.	)	Case No.: _____ (2:09-CR-20011-D)

MOTION PURSUANT TO 28 U.S.C. §2255 TO VACATE CONVICTION AND SENTENCE

Movant, JAE LEE ('LEE'), pro se, respectfully moves pursuant to 28 U.S.C. §2255 to vacate his guilty plea, conviction, and sentence in Case No.2:09-CR-20011-D. As set forth herein, LEE relies primarily on the recent holdings enunciated by the Supreme Court in Padilla v. Kentucky, WL 1222274 (2010).

JURISDICTION

On January 28, 2009, LEE was indicted on one (1) count of "Possession With Intent To Distribute MDMA," pursuant to 28 U.S.C. §841(a)(1). (DE:2; Appdx:1a)[1] On June 17, 2009, LEE entered a plea of guilty to the aforesaid indictment based upon a plea agreement. (DE:21; Appdx:17a-19a) On September 28, 2009, LEE was sentenced to one (1) year and a

[1] Unless otherwise noted, citations to "DE" refer to the Docket Entries of the underlying criminal case (No.2:09-CR-20011-D). References to "Appdx" refer to specific documents that appear in the "Appendix of Exhibits" which was *separately* filed in support of the instant motion.

day, plus three (3) years supervised release. (DE:25; Appdx:53a-73a) The attendant Judgment and Commitment Order was entered on September, 29 2009. (DE:27,30; Appdx:20a-29a) LEE did not pursue a direct appeal. Furthermore, this is LEE's first §2255, and it has been filed *within* the one-year limit governed by the Antiterrorism and Effective Death Penalty Act (AEDPA). This Court thus has jurisdiction. See 28 U.S.C. §2255.

SUMMARY OF ARGUMENT

LEE asserts his guilty plea, sentence and conviction were rendered in violation of his Sixth Amendment guarantee to effective assistance of counsel. Accordingly, this case is first governed by the protocols of Strickland v. Washington, 466 U.S. 668 (1984), which require a defendant to demonstrate "counsel's performance was deficient" and that "counsel's unprofessional errors prejudiced the defense." Id. at 687.

As to Strickland's first prong, LEE must show the representation provided by his counsel, Larry E. Fitzgerald, esq., "fell below an objective standard of reasonableness," as measured by "prevailing professional norms." Id. at 688. In this regard, LEE respectfully submits that such a determination should be uncontroversial due to two (2) factors. First, the Supreme Court recently held in Padilla v. Kentucky, WL 1222274 (2010), that performance is deficient under Strickland when an attorney fails to advise the client that deportation is a likely consequence of his/her guilty plea.

Secondly, the facts of this case establish Fitzgerald not only failed to advise LEE that deportation was virtually a certainty if he pleaded guilty,

but that Fitzgerald actually *affirmatively misadvised* LEE (who had been a legal resident of the United States for the past 30+ years since his arrival as a child) that he would *not* be deported if he accepted a plea. Indeed, upon the unexpected realization by LEE several months *after* sentencing that INS was planning to deport him upon conclusion of his sentence, Fitzgerald even sent a letter for LEE to provide INS, stating: "There was never any discussion of deportation during the negotiation of the Plea Agreement or during Sentencing. It was my understanding the Government was not seeking Deportation of Mr. Jae Lee." (Infra; also Appdx:86a-87a) As well, the record shows that even the prosecutor and Court did not realize LEE risked deportation. (Infra; also Appdx:53a-73a)

Beyond deficient performance, however, LEE must still also satisfy Strickland's second requirement of demonstrating counsel's errors caused him "prejudice." For guilty pleas this requires a showing of "a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and instead insisted on trial." Hill v. Lockhart, 474 U.S. 52 (1985). This Court's determination is based upon an "objective inquiry" into the likely outcome of a trial had LEE not pleaded guilty. Id.; see also Railey v. Webb, 540 F.3d 393 (6th Cir.2008). It is important to distinguish, however, that to establish prejudice, LEE need not show with absolute certainty that a jury would have acquitted him, but demonstrate only that there was a reasonable potential for a favorable outcome. See Dando v. Yukins, 461 F.3d 791 (6th Cir.2006).

As to the foregoing, LEE respectfully submits that the record and evidence will demonstrate he had

an extremely meritorious defense had he gone to trial. That is, relatively speaking as far as federal drug prosecutions go, this was a very minor drug case involving a seizure of only eighty-eight (88) Ecstasy pills. Moreover, all of the evidence (provided through discovery that is), including the oral statements of LEE and other witnesses, showed that LEE possessed the pills for *personal use,* and "did not sell the Ecstasy to anybody, [but] would give it away when he would go out to party with friends." (Infra; see also DE:16; Appdx:3a, 12a)

In fact, even after allowing the Government to include every imaginable manner of relevant conduct into the PSI, the grand total of aggregate Ecstasy pills that could be mustered against LEE was only three-hundred (300) pills, extended over an eight (8) year period no less. Pertinently, Lee was not charged with simple "possession" of MDMA, but was charged and pleaded guilty to "Possession With Intent To *Distribute* MDMA" - a qualifying offense under Immigration Law triggering virtually automatic deportation.

Secondly, the PSI revealed that there was the potential (at best) for the Government to use the testimony of a Confidential Informant (CI) regarding some prior transactions. In fact, it was through this nexus that the Government used the relevant conduct provisions of the Guidelines to increase the amount of Ecstasy pills from eighty-eight (88) to three-hundred and three (303). Notwithstanding its use for relevant conduct purposes, however, the CI-nexus was *never* mentioned anywhere in the Government's Rule 16 Discovery Response Letter, nor even in any of the DEA Investigation Reports filed in this case. (DE:16; Appdx:3a-16a) Moreover, when asked

at the plea change hearing what the evidence at trial *would* have been had LEE not pleaded, the Government again made no mention of the CI, but instead relied *exclusively* on the eighty-eight (88) Ecstasy pills retrieved from LEE *personally*, and that to prove the "distribution" element, experts would have purportedly testified that an amount eighty-eight (88) pills was consistent more with a trafficker than personal use. (Infra; also DE:20; Appdx:45a-46a)

Accordingly, as distinguished herein as relevant to LEE's prejudice-prong argument, as a threshold matter, the law-of-the-case doctrine and discovery rules make it far from liquidated that the Government could now suggest in these §2255 proceedings that the PSI-constrained mention of the CI and events related to him for "relevant conduct" purposes could have been used against him to demonstrate proof of distribution rather than possession, and thus, should be included as part of this Court's objective assessment into whether LEE could have advanced a plausible defense if he had gone to trial. That is, the Government's failure to disclose in its Discovery Response or DEA Reports that a CI would be used at trial should have prohibited them from doing so. F.R.C.P. Rule 16.

Nevertheless, what makes LEE's §2255 claims particularly compelling are that, even if one were, *in arguendo*, to gratuitously include a presumption the Government could have somehow engineered a way to insert the undisclosed CI-nexus into a trial prosecution, LEE can still *surpass* his burden of establishing he possessed a plausible defense and reasonable potential of a favorable trial outcome. Specifically, had the Government sought to use the CI and events related to him to prosecute LEE for a

"distribution" case, discovery rules would have required the Government to disclose the several instances where the CI had proved to be unreliable - if not outright scandalous - while working for law enforcement in numerous instances and even other cases. (Infra; also Appdx:88a-93a)

Furthermore, the Government would have also been required to provide copies of "audio recordings" between the CI and LEE which, as this Court will observe, were also never mentioned in the Government's Rule 16 Discovery Response Letter or evidence proffer. Pertinently, these recordings would have engendered severe credibility problems with any testimony of the CI, as well as made an *extremely* strong entrapment defense available to LEE. More relevantly, however, the required hand-in-hand disclosures relevant to the CI would have not only produced more harm than benefits in any prosecution of LEE, but would have resulted in damage to ongoing and *related* prosecutions of much more serious, high-level, drug traffickers. (Infra; also Appdx:88a-93a) Simply put, LEE submits that the Government's omission of any mention of the CI or the alleged controlled buy were not mere oversights, but were *strategic* omissions actually based upon an inability to effectively use the CI in this case, as well as other much more important ones.[2]

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[2] Indeed, although LEE did not learn of it until after sentencing, it was later discovered that use of the CI had become so problematic and undesirable for the Government that LEE's arrest was done so prosecutors could essentially use him as a surrogate for the CI in order to extract pleas and co-operation from the numerous high-level drug traffickers they were planning to, and did later prosecute. (Infra; also Appdx:88a-93a)

Independent of the foregoing issues, but nonetheless cumulative, LEE also asserts two (2) additional claims relevant to his ineffective assistance arguments. First is that Fitzgerald failed to conduct an adequate investigation *relevant* to the advice he gave to LEE to plead guilty rather than go to trial. As to this sub-argument, LEE relies on both Strickland, as well as Wiggins v. Smith, 539 U.S. 510 (2003), which held counsel's decision not to investigate is only reasonable if professional judgment demonstrated particular investigations were unnecessary. Id. Here, the record shows Fitzgerald conducted no investigation into the case, possible defenses, witnesses, or discovery. In fact, Fitzgerald did not even request to see a copy of the search warrant or its supporting affidavit, much less raise the substantial 4th Amendment grounds which existed to challenge validity (infra).

Thus, as applied to the law, Fitzgerald's decision not to investigate anything and instead recommend what amounted to a "low risk" convenience plea cannot be given deference or deemed strategic. This is because Fitzgerald's advice was based on his misunderstanding of the law and misrepresentations to LEE that he would not be deported if he accepted the plea. See Bradshaw v. Stumpf, 545 U.S. 175 (2005) (guilty plea operates as a waiver of important constitutional rights and must be an informed choice among all available alternative courses of action); North Carolina v. Alford, 400 U.S. 25 (1970)(guilty plea must be voluntary, knowing, and intelligent, with sufficient awareness of relevant circumstances and likely consequences); see Dando, supra, 461 F.3d at 799 (decision not to investigate and instead recommend plea was *not* sound professional judgment because it was based upon counsel's misunderstand-

ing of law). Moreover, Fitzgerald's misunderstanding was critical. See INS v. St. Cyr, 533 U.S. 289, 323 (2001)(recognizing that preserving client's right to remain in the United States may be more important than any potential jail sentence").

Lastly, LEE separately asserts that Fitzgerald also rendered constitutionally deficient performance at sentencing when he misadvised the Court he was a "citizen of the United States," when LEE clearly was not. (Infra; also Appdx:62a) Concerning this, LEE must establish there is a reasonable probability he would have received a different sentence. Porter v. McCollum, 130 S.Ct. U.S. 447, 453 (2009). As detailed infra, by Fitzgerald's misinforming that LEE was a U.S. citizen, the Court was deprived of the knowledge of a commonly relied-upon factor used by Court's consistent with their sentencing discretion under the *advisory* Guideline regime.

FACTUAL AND PROCEDURAL HISTORY

The Search Warrant Execution

According to the Drug Enforcement Agency (DEA) Investigation Report submitted by the Government through discovery, on January 7, 2009, at approximately 6:00 a.m., members of a DEA Joint Task Force, including Tennessee State and local law enforcement, executed a federal search warrant on LEE's residence. (DE:16; Appdx:9a-16a) Agents searched the resident and retrieved a loaded rifle; $32,432 in U.S. Currency contained in a "blue bag;"[3]

---

[3] LEE owned two (2) restaurants and the "blue bag" was a bank-issued depository bag.

and eighty-eight(88) MDMA (Ecstasy) pills. (DE:16; Appdx:9a-16a)[4]

With respect to the "oral statements" of LEE and Amy Chu (LEE's girlfriend of twelve (12) years), the DEA Report stated:

> "Prior to transporting LEE to the Memphis Resident Office, LEE advised TFO's Brunson and Stauffer that all of the narcotics recovered from the residence were his. LEE further stated he had used both the vehicles [located and at his residence] to transport the narcotics when he would go out to party with friends. LEE stated that he did not sell the Ecstasy to anybody, but would give it away. LEE stated that he smoked marijuana on a regular basis; however, he had used what little marijuana he had prior to the officers/ agents executing the search warrant at his residence.

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[4] Relevantly, LEE disputes eighty-eight (88) Ecstasy (MDMA) pills were recovered, but that it was actually only eighty-five (85). Lee attributes this to agents either miscounting, or possibly aggregating in three (3) prescription-authorized, Valium tablets also recovered. (See DEA Report, pg# 3 of 7; or Appdx:11a). Consistent with the possibility agents miscounted or made errors is that the DEA Report reflects their misstating throughout with the numeric notations of "(80)," but inconsistently also using the wording of "eighty-eight." (See DEA Report at pgs# 3, 5; or Appdx:11a-13a) Moreover, when observing the "DEA's Drug Property Report," the weights listed seem incorrect (i.e. only eight(8) MDMA pills weighed 26.2 grams, whereas an identical eighty (80) tablets (being ten times that amount) weighed just 48.8 grams). (SEE DEA Report, Appdx:16a)

> . . . TFO Stauffer then advised Amy CHU of her Miranda Rights. . . CHU stated that she had used Ecstasy and Marijuana with LEE. CHU stated that she never purchased narcotics. CHU stated that LEE would give it to her when they were partying. CHU stated that she had no knowledge of LEE's narcotic trafficking. CHU was released at the scene." (emphasis added)(DE:16, pg# 4-5; Appdx:12a-13a)

Lee's Arrest & Indictment

As a result of the aforesaid search warrant execution and recovery of the eighty-eight (88) Ecstasy pills, LEE was arrested and charged by the State of Tennessee (See Tenn. v. Lee, Case No. 09100717), but was released immediately on bond. To represent him in the State Case, LEE privately retained Fitzgerald. Three (3) weeks later, however, the federal government elected to assume the case. Accordingly, a federal indictment was returned against LEE on January 28, 2009, for a single count of "Possession With Intent To Distribute MDMA (Ecstasy) pursuant to 28 U.S.C. §841(a)(1)." (DE:2; Appdx:1a) The Tennessee State case was thus later dismissed. See Tenn. v. Lee, supra.

After the issuance of the indictment, federal agents went to one of LEE's restaurants to take him into custody on January 30, 2009. (DE:6) Fitzgerald advised LEE he also did "federal work," and thus, LEE elected to keep him as counsel. The Government initially sought pretrial detention, however, upon conducting hearing, the Magistrate granted LEE's release based upon his agreeing to pay a $1,000 cash deposit with the Court, standard release conditions, and the requirement he surrender his passport. (DE

6-11) The $1,000 deposit and surrender of his passport to Clerk was done the same day and LEE was released. (Id.) Pertinently, the Clerk issued a receipt of "Foreign Passport," which was serviced upon Fitzgerald and clearly showed LEE was a "citizen of Korea." (DE:12; Appdx:2a)

The Government's Rule 16 Discovery Letter & Attachments

Approximately one (1) month later, on March 3, 2009, the Government issued its "Rule 16 Discovery Response Letter," wherein the AUSA outlined the evidence and witnesses the Government intended to use at trial. Specifically:

> (i) all of the physical evidence seized through the federal search warrant;
>
> (ii) LEE's prior criminal history (which constituted only a misdemeanor Public Intoxication and Disorderly Conduct charge from sixteen (16) years earlier);
>
> (iii) laboratory analysis and expert testimony relevant to the eighty-eight (88) Ecstasy pills seized by the warrant; and
>
> (iv) the "oral statements" made by LEE in the presence of agents at the scene of the search warrant raid that: "all of the narcotics from the residence are mine. I did not sell the Ecstasy to anyone. I gave it away." (DE:16; Appdx:3a-16a)

Attached to the Government's Discovery Response was a copy of the DEA Report discussed supra, at pgs# 9-10. (See also DE:16; Appdx:9a-16a) As can be observed, although the Discovery Response and DEA Report mention a search warrant was

executed, nowhere was copy of that warrant ever provided, nor any explanations given revealing any of the background into what grounds that warrant was supposedly obtained. That is, completely absent from the Discovery Response and DEA Report were any mentions whatsoever a CI was involved or that the warrant was precipitated by events and information allegedly related to him. Rather, as becomes relevant to the "prejudice prong" analysis *infra*, it wasn't until the PSI (conducted *after* the plea change) that this ever appeared.

The Pre-Trial Proceedings & Plea Negotiations

As early as three (3) weeks after the Government's Discovery submissions, the record reflects Fitzgerald at the first status conference was already foretasting that this "relatively minor case" would likely result in LEE's acceptance of a plea agreement. (DE:18). In the weeks thereafter, Fitzgerald made representations to LEE concerning what the Government intended to offer, as well as what the likely sentence and consequences were that LEE could expect. (See Declaration of LEE, Appdx:88a-93a). In this regard, Fitzgerald advised that in light of LEE's lack of criminal history; the small amount of Ecstasy; application of the "safety-valve;" etc., he would likely get "probation or house-arrest." (Id.)

Importantly, in that LEE had been a *legal* resident of the United States for more than thirty years since his arrival as an child, he *expressly* inquired whether there was "any possible chance" he could loose his legal status and be deported. (Id.) To this, Fitzgerald advised that the Government had not said that they would seek his deportation, as well as that because LEE had lived so long in the United States, he (Fitzgerald) was "certain" the Government could

not get LEE deported "even if they wanted to." (Id.) Nevertheless, LEE advised that before he agreed to any plea deal that Fitzgerald had to "make sure" there was no chance of deportation. (Id.)

In the weeks that followed, Fitzgerald inquired of LEE what he intended to do about his case. When LEE asked for his legal recommendations, Fitzgerald advised that LEE likely could make out a strong case for simple possession instead of distribution, as well as that the unseen search warrant "might" be challengeable once the supporting affidavit was reviewed, but that there was always a "litigation risk" of losing at trial. (Id.) In this vein, Fitzgerald advised that if LEE lost a trial he could face "three to five years in prison," as well as cause the Government to "decide to seek his deportation;" whereas, according to Fitzgerald, if LEE accepted a plea he would get probation or house arrest and *not* risk any deportation. (Id.) That is, Fitzgerald *affirmatively* advised LEE that in exchange for his guilty plea, the Government had agreed: "to recommend the maximum early acceptance reduction;" "not to object to the safety-valve;" and "not seek deportation." (Id.)

It was based only upon the foregoing assurances from Fitzgerald that LEE agreed to plea guilty and not pursue his right to jury trial and valid trial defenses. (Id.) Moreover, according to Fitzgerald, because LEE was going to plea, the Government purportedly was not obligated to provide a copy of the search warrant or supporting affidavit. (Id.) In short, Fitzgerald made the decision no efforts to investigate defenses, witnesses, discovery, etc., were needed in light of LEE's decision to plead.

The Plea Agreement

At the very next status conference, on May 21, 2009, the Government and Fitzgerald represented that a "deal" had been reached. (DE:19) Accordingly, the Court scheduled a "Plea Change Hearing" for June 17, 2009. (Id.) It was not until a few days before the hearing, however, that Fitzgerald provided LEE with a copy of the Plea Agreement, which outlined the following terms for LEE's plea to one (1) count of a violation of 21 U.S.C §841(a)(1):

> (i) the Government would jointly recommend he receive a three-level reduction for acceptance of responsibility;
>
> (ii) the Government would not object to a finding he qualified under the safety-valve;
>
> (iii) the Government had not made any promises or representations as to what sentence would be imposed;
>
> (iv) if LEE committed or attempted to commit any additional crimes or obstructed or impeded justice, then the Government was free to argue for any sentence in statutory limits; and
>
> (v) that the "special assessment" was due and payable immediately following sentencing. (DE:21; Appdx:17a-19a)

While reviewing the plea agreement, LEE again *expressly* sought assurances from Fitzgerald that there was no risk of losing his legal alien status or being deported. (See Declaration of LEE, Appdx:88a-93a) As to this inquiry, Fitzgerald again not only advised LEE his legal status, ties, and 30+ years in the United States purportedly made it "impossible"

to obtain his deportation based on this "minor drug case," but that he had confirmed that the Government were "not in any way going to be seeking deportation." (Id.) Indeed, Fitzgerald claimed that if the Government had wanted to include deportation as part of the sentence, it would have "had to been included within the Plea Agreement." (Id.) Thus, as Fitzgerald explained, because the plea agreement was "binding" on the Government, the non-inclusion of any deportation purportedly "fully protected" LEE. (Id.) Based only on the foregoing representations did LEE sign the plea. (Id.)

The Plea Hearing

On the morning of the plea change hearing, Fitzgerald advised LEE that the Court was going to ask him a series of "standard questions and warnings," which the law required him to say he "understood" in order for his plea to be accepted, but what "really mattered most was what the plea agreement states, because that's what is binding." (See Declaration of LEE, Appdx:88a-93a)

At the hearing itself, the Court began with a series of standard advisements. For example, this included inquiring if LEE was aware that the offense to which he was pleading carried "a maximum penalty of 20 years, plus a maximum fine of one million dollars." (DE:20 at pg# 8-9; Appdx:37a-38a) To this, LEE *promptly* responded: "Yes, Your Honor." (Id.) Next, the Court advised: "[t]his is a felony offense, and if you are convicted of this felony offense, whether it's by trial or by plea, it could have certain negative affects on your civil rights, you could lose the right to vote, the right to possess and carry a firearm, the right to serve on a jury, and the right to stand for certain public offices. Knowing those

important rights and/or benefits could be affected, are you still wishing to go forward and plead guilty?" (DE:20 at pg# 9; Appdx:38a) To this, LEE again *unhesitatingly* responded: "Yes, Your Honor." (Id.)

After that the Court then asked: "Are you a U.S. Citizen?," to which LEE responded "No, Your Honor." (Id.) Accordingly the Court then advised: "Okay. A conviction on this charge then could result in your being deported. It could also affect your ability to attain the status of a United States citizen. If you do become a United States Citizen, it could affect your rights to participate in certain federal benefits, such as student loans. (DE:20 at pg# 9-10; Appdx:38a-39a) Despite having no hesitation with any of prior inquiries, when the Court asked: "Does that at all affect your decision about whether you want to plead guilty or not?", LEE in this instance clearly stated: "Yes, Your Honor." (Id.) As such, the Court then inquired: "Okay. How does it affect your decision?", to which LEE advised: "I don't understand." (Id.)

At this point, Fitzgerald spoke "quietly into [LEE's] ear," advising him the Court was just giving him a "standard warning" given to every non-U.S. Citizen, but reminding that the Government had confirmed they were "not going to seek deportation," as well as that the "binding" plea agreement itself did not include that LEE would be deported as part of his sentence. (See Declaration of LEE, Appdx:88a-93a) After Fitzgerald's quiet consolations, the Court then re-inquired: "Okay. Well, knowing these things do you still want to go forward and plead guilty?," to which LEE only now responded: "Yes, Your Honor." (DE:20 at pg# 10; Appdx:39a)

The Court then proceeded to have the Government "summarize the terms of the plea agreement."

(DE:20 at pg# 10-15; Appdx:39a-43a). LEE then likewise confirmed he had "discussed the plea agreement" with [Fitzgerald]; that Fitzgerald had "answered any questions;" and he had signed the plea agreement of his "own free will". (Id.) Lastly, the Court instructed the Government to proffer what its proof would have been at any trial. (DE:20 at pg# 16-17; Appdx:45a-46a) Relevantly, just as the Government's Rule 16 Discovery Letter and DEA Report, again no mention was made of a CI-nexus. Rather, the AUSA claimed the evidence at trial to prove "Possession With Intent To Distribute," would have solely been:

> "Had this matter proceeded to trial the government would have established that on January 7, 2009, members of law enforcement executed a federal search warrant [at] the defendant's residence. Inside they found in the living room area $32,432. And in the dining area eight MDMA tablets in a cigarette box on the bookcase. And 88 additional MDMA tablets in a plastic bag on the bookcase. Those tablets field tested positive for the presence of MDMA.
>
> According to members of law enforcement, in their training and experience, the amount of MDMA recovered was consistent with distribution rather than personal use. The defendant was arrested in the residence and spoke with law enforcement and

admitted that the MDMA tablets belonged to him." (DE:20 at pg# 16-17; Appdx:45a-46a)[5]

The Court thereafter accepted LEE's change of plea. (DE:20, pg# 18-19; Appdx:46a) A sentencing hearing was scheduled and Probation ordered to prepare a Presentence Report (PSI). (Id.)

The PSI

Importantly, the record shows it was only in the PSI that the first mention was ever made in this case about the existence of a CI, an alleged "controlled buy" and an "audio recording." (PSI:4-7) Specifically, based on information provided by Case Agents, Probation detailed that sometime in mid-2008, a CI cooperating with law enforcement advised he had known LEE for the past twelve (12) years, and that LEE had "been involved in drug trafficking since 1999." (PSI:4)

Despite the CI had known LEE for more than a decade, the history of alleged drug transactions the CI could recount was limited to have allegedly bought "one ounce of hydroponic marijuana," on "two occasions for $350 an ounce," as well as "approximately 200 Ecstasy (MDMA) pills."(PSI:4) Relevantly, however, the PSI detailed the approximately two-hundred (200) Ecstasy pills allegedly obtained by the CI from LEE were spread across forty (40) separate transactions during an eight (8) year

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[5] The prosecutor misread the DEA report as stating eight (8) pills and eighty-eight (88) pills (i.e. ninety-six (96) pills) were retrieved, however, when the report is reviewed carefully, it shows less (i.e. eighty-eight (88) pills), despite that even that number was wrong as well. (See supra, at pg# 8-9, n.4, for details)

period; that is, "approximately, 5 occasions in 2001; 5 occasions in 2002; 5 occasions in 2003; 5 occasions in 2004; 7 occasions in 2005; 5 occasions in 2006; 6 occasions in 2007; and 2 occasions in 2008." (Id.) Thus, although the CI could not recount what the actual amounts were for each transaction, logic dictates that with the two-hundred (200) pills spread across an eight (8) year period and forty (40) separate transactions, each occasion must have only involved a small number of pills (i.e. 5 pills) each time.[6]

The case agents also reported that the CI had claimed he owed LEE "$150 for an existing drug debt." (PSI:4)[7] Based on this claim, agents provided the CI with $150 in Government funds and instructed him to meet with LEE and "settle the debt." (Id.) On December 2, 2008, agents claimed they observed the CI entering LEE's residence, where he remained for approximately ten (10) minutes. (Id.) Although agents did not see the transaction themselves, the CI later reported to agents that he paid the debt, as well as that, while there, he also observed LEE allegedly packaging fifteen (15) Ecstasy tablets into a cellophane wrapper. (Id.)

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[6] The CI did not begin working with law enforcement until mid-2008, and thus, all the transactions recounted by the CI allegedly occurred before his own arrest and before his cooperation with the agents began.

[7] The PSI does not distinguish for what the drug debt related. However, LEE claims it was due to him and the CI having previously agreed to *split* on an ounce of marijuana which the CI smoked, but never provided the money to cover his share. (Declaration of LEE, Appdx:88a-93a)

Approximately nine (9) days later, on December 11, 2008, agents provided the CI with $300 in government funds to conduct a "controlled buy" of fifteen (15) Ecstasy pills. (Id.) According to the agents, "the CI was outfitted with a recording device and placed under visual surveillance to conduct the transaction." (Id.) Upon return from the alleged transaction, the CI advised he had purchased the fifteen (15) Ecstasy pills from LEE. (Id.) Agents did not, however, provide Probation any details as to what the contents of the alleged "recording device" contained. (Id.)

Subsequent to the information related to the CI, the PSI only then proceeded to recite the events related to the execution of the actual search warrant, retrieval of the eighty-eight (88) Ecstasy pills, the oral statements of LEE, etc. (Id.) This *post-CI* information tracked the same as what appeared in the Government's Rule 16 Discovery Response and accompanying DEA Report discussed previously herein, at pgs# 9-12, supra. Thus, it was through this previously *undisclosed* CI nexus involving the two-hundred (200) Ecstasy pills allegedly purchased from LEE in the eight (8) years prior, plus the alleged fifteen (15) pill controlled buy, that the PSI was able to use relevant conduct provisions to aggregate the amount of pills for sentencing purposes to be three-hundred and three (303) pills, rather than just the eight-eight (88) Ecstasy pills which formed the actual offense of conviction. (PSI:5)[8]

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[8] For clarification, LEE does not dispute the inclusion of the CI-nexus into the PSI was potentially permissible for relevant conduct considerations. Rather, LEE's legal argument is that its non-disclosure in discovery and evidence proffer at the plea

[Footnote continued on next page]

As to calculations, the PSI hence determined that the base offense level was eighteen (18), to which two (2) levels were added for possession of the firearm. (PSI:6) No further aggravating enhancements were found. (Id.) From the adjusted offense level of twenty (20), three (3) levels were reduced for early acceptance of responsibility. (Id.) However, although the plea agreement included that the Government would "not object to the two-level safety valve if the defendant qualified," the PSI explained the presence of the gun at the residence "automatically disqualified" LEE for the provision, despite that Fitzgerald had represented to LEE that he would, in fact, be receiving it. (Id.; see also pg# 14-16, supra) Accordingly, with the adjusted base offense level remaining at seventeen (17), and with no criminal history, the recommended advisory guideline range was 24-30 months. (Id.)

Approximately ten (10) days before sentencing, the Government filed notice that they had no objections to the PSI. (DE:23) Three (3) days before sentencing, Fitzgerald provided the PSI to LEE for review and comment. (See Declaration of LEE, Appdx:88a-93a) Of course, LEE's *preliminary* concern was that the safety-valve had not been given and the range of 24-30 months was certainly more than the forecast of probation or house arrest. (Id.) Additionally, however, LEE expressed detailed

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change hearing raises questions as to whether it can now be said to have been part of what would have used to prosecute LEE to prove a *distribution* case at trial. Put simply, for purposes of the legal analysis herein, there is a big difference between "offense conduct" and "relevant conduct."

concerns about the untrue and inaccurate claims being made in the PSI relevant to the CI.

In response to LEE's concerns, Fitzgerald conceded he had "not realized" LEE would be "automatically disqualified" for the safety-valve, but that the advisory nature of the Guidelines and judicial discretion made it "very likely the Court would still issue a below-guideline sentence based on the insignificant nature of the case." (Id.) In any event, according to Fitzgerald, even if "some incarceration time were issued," it would *"not* be more than one-year," which could then be reduced through the "drug program and half-way house," as well as LEE would be able to serve his minimal custody time at a "Prison Camp near his residence." (Id.) The foregoing were, of course, the most important considerations to LEE at the time because LEE was still operating under the belief he would not lose his legal status or be deported, and thus, the thrust of LEE's concern was about how his restaurants would be impacted during the period he would be away from them.

As to LEE's concerns about the inaccurate and untrue claims in the PSI about the CI, LEE reported the following inconsistencies:

> (i) the CI had never paid the $150 debt in the way he claimed;
>
> (ii) that the CI was a "mooch" and that LEE had never sold him any Ecstasy;[9]

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[9] According to LEE (and other witnesses), the CI would always show-up when friends were partying and would "mooch" free drugs, as well as that even when the CI claimed he was going "chip in" his own money to cover costs of buying drugs for

[Footnote continued on next page]

(iii) on the occasion the CI falsely claimed to have paid the $150 debt, the CI had *not* seen LEE packaging any pills because LEE had not had any;

(iv) that at the aforesaid occasion, the CI had told LEE he really needed some pills to party with a girl he had met, but that LEE had none because, as LEE advised the CI, he was trying to cut down on doing Ecstasy and hadn't bought any for a while because his restaurant businesses had slowed down;

(v) that contrary to what the CI later reported to agents, the CI left LEE's residence without paying the debt, and instead only "offered" to do so, as well as "cover the cost" of the 15-20 pills he needed to party with, but that LEE still advised the CI he didn't want to get him any pills because he (LEE) was trying to quit taking Ecstasy due to having become an "expensive habit;"

(vi) that in the days that followed, the CI *repeatedly* telephoned LEE asking he reconsider getting him some Ecstasy "as a favor" so he could party with his new girlfriend, but that on at least *three* (3) *dozen occasions*, LEE still refused;

(vii) that ultimately, after a week of repeated and persistent calling, LEE ultimately acquiesced and agreed to get the CI some Ecstasy pills so that the CI would stop "stalking" him

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partying, he would never follow-through and leave LEE with the costs. (Declaration of LEE, Appdx:88a-93a)

for the pills to party with his girlfriend, but that the CI needed to cover the costs and pay for the marijuana ounce they had previously split;

(viii) that LEE then went and bought pills from his "source," and (as he usually did) had to buy one-hundred (100) tablets in order to get the price of $20 per pill, rather that $30 per pill (i.e. $2000 versus $3000);[10] [11]

(ix) that when LEE contacted the CI to pick up the fifteen (15) pills he requested and bring the $450 he owed (the prior $150 for the split on the marijuana, plus the $300 to cover the costs for the pills the CI wanted), the CI told LEE to come to the CI's house and pick-up the money in his mailbox;

(x) that when LEE (with a companion) arrived at the CI's house and went into the mailbox, an envelope containing only the $150 for the marijuana debt was enclosed (i.e. the same $150 he had already untruthfully reported to agents he had paid LEE a week earlier), along with a handwritten note

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[10] According to LEE, he was going to use the rest of the pills for partying with friends which, with each person consuming 3-5 pills, would have only lasted him only a month or two. However, as discussed infra, consistent with his claims of wanting to quit, after giving the fifteen (15) pills to the CI, LEE never used any of the one-hundred pills that he had left, let alone sell them to anybody. (Declaration of LEE, Appdx:88a-93a; also infra).

[11] Relevantly, as would be later discovered, LEE's source was a "Lum Gum," an actual drug-trafficker who agents were actually interested in, and which they later prosecuted (details infra).

which stated that "this is all I have right now;"

(xi) that upon LEE contacting the CI and asking where the rest of the money was for the pills he wanted, the CI advised he would come by LEE's house and pick them up the next day;

(xii) that when the CI did come to pick-up the fifteen (15) pills and pay, LEE engaged in a discussion about the $150 being left in the mailbox (instead of the $450), and that this was the type of "B.S." that had caused LEE not to want to do him any "favors" in the first place;

(xiii) that during the same discussion, LEE reiterated to the CI that he was really trying to "cut-back" on taking Ecstasy, and that this had been the "first time in a very long time" he had even gone to his source (Gum Lum) for pills;

(xiv) that LEE could produce numerous witnesses for Fitzgerald who would testify not only that LEE would never sell them drugs but give them away, as well as that the CI was a "mooch" and "free-rider;" and

(xv) that the PSI stated agents claimed the CI had been outfitted with a recording device, and thus, Fitzgerald should obtain the audio recordings (which were never disclosed in discovery) because they would have revealed: (a) the CI had lied about seeing him package pills, paying the debt, having bought pills in the past eight (8) years (as opposed to being given them for free to

> party), etc.; and (b) that LEE had only got the pills as a favor for the CI because he persisted in calling him more than three (3) dozen times and begging for his help so he could part with a new girlfriend he had met. (See Declaration of LEE, Appdx:88a-93a)

In response, Fitzgerald advised "these things always popped up during the PSI process," but that spending time challenging the inconsistencies was unnecessary because, according to Fitzgerald, the small amount of MDMA pills "with or without" the CI claims "would not change the ultimate sentence," and thus, it would be better to focus efforts on LEE's personal characteristics and using them to get the lowest sentence possible. (Id.) [12]

The Sentencing

At the sentencing hearing, without objection from the parties, the Court reviewed and adopted the PSI findings, calculations, and the recommended 24-30 month range. (DE:25 at pgs# 7-9; also Appdx: 59a-61a) The Court then requested Fitzgerald proffer his arguments concerning the "3553(a) factors." Fitzgerald stated:

> "Your Honor, Mr. Lee up to this point, Your Honor, had been an exemplary citizen of the United States. He has been here since he was 12 years old, currently came her with a language barrier, has done very well for

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[12] Fitzgerald also advised LEE that his concern about only eighty-five (85) pills being retrieved as opposed to eighty-eight (88) was also "not worthy of challenging" because it would "not have impacted the advisory guideline range calculations." (Id.; see also, supra pg# 19, n.5 for further details)

himself, opened up - came to Memphis, Tennessee some years ago and had opened up two restaurants, been doing quite well for himself except for this, I guess, what I call one glitch, one glitch, Your Honor. . . Well, Your Honor, We're talking about 300 tablets, Your Honor, that - that's 300 tablets of ecstasy, Your Honor, I mean, that's not - I guess, even if you took it over a ten year period, what are we talking about, 30 pills a year. I'm saying that it is serious maybe over a period of time, but I'm saying it's not a lot, that's all I'm saying, Your Honor. . . Although he was - he was making a living, when you look at his financial condition, it is not one that looks like he's in - he has a negative $12,000 as far as his assets and liabilities are concerned. So he has been making a living but he hasn't been able to just - he's not rich, Your Honor, and not wealthy in any sense of the word." (emphasis added) (DE:25 at pgs# 10-12; Appdx: 62a-64a)

The Government then provided its outlook on the case:

"[T]his has been an ongoing case of narcotics dealing since January of 2001, it's undisputed in the report. There were 200 ecstasy pills purchased by - from the defendant by the confidential informant between January of 2001 and December of 2008. There was a purchase of 15 pills in December of 2008. The criminal history is nonexistent, which is a very good thing for Mr. Lee. And he has been the owner of this restaurant in Bartlett, Mandarin Palace, since 1991 and appears to

> have some talent in that area and is, by all accounts, in that area performing very well. So those factors do weigh in favor of Mr. Lee."(emphasis added)(DE:25 at pgs# 15; Appdx:67a)

With respect to LEE's comments to the Court, he stated only:

> "I made a big mistake in my life, and, please, I need a second chance so I can continue with my restaurant which I love to do. Thank you."(DE:25 at pgs# 14; Appdx:66a) Upon hearing the parties, the Court then stated:
>
> "I believe that to give a probationary sentence under the circumstances of this case would send a wrong message. But I don't believe 24 months is necessary to get this defendant's attention and punish. So the court is going to impose a custody sentence of 12 months and a day. The court is going to impose a period of three years supervision. And the court will impose a fine in this case of $5,000, along with a one hundred dollar special assessment. That is going to be the court's sentence. Now this 12 months plus one day sentence will allow you to serve a minimum amount of time and you should be able to keep your restaurant going. Given this defendant's record, the court will recommend he be allowed to serve his time at the Millington camp. And the defendant will be allowed to self report." (emphasis added) (DE:25 at pgs# 16-19; Appdx: 68a-81a)

Relevantly, at no time during the sentencing hearing was there any discussion about any

deportation of LEE. Indeed, to the contrary, the record shows everyone was operating under the assumption LEE would not be deported. That is, the prosecutor, Fitzgerald, LEE himself, and even the Court all focused their considerations on LEE's restaurant businesses and an objective of fashioning a sentencing which would allow him to keep operating them after his release. (DE:25 at pgs# 10-19; Appdx: 62a-81a) Furthermore, the actual Judgment & Committal Order (J&C) did not include any of the standard conditions or language included when deportable aliens are sentenced. (DE:27; 30)[13] [14]

LEE's Post-Sentencing Realization Of His Being Deportable

After sentencing, an Order directing LEE to self-surrender by February 1, 2010 was issued. (DE:31) In the intervening five (5) months between LEE's sentencing and self-reporting date, however, the BOP elected to *not* follow the Court's recommendation to designate LEE FPC Millington (which was only fifteen (15) minutes away from his home), but to instead designate LEE to "CCA-Adams," in Mississippi. (DE:34-35) Moreover, although he would not realize it until much later, the reason the BOP had not followed the recommendation to designate

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[13] A J&C for a deportable alien will include conditions that a defendant is to be turned over to INS for deportation at the conclusion of his sentence, or that any supervised released is non-reporting while the he/she remains outside the United States. LEE's J&C, however, did not.

[14] The reason two (2) J&Cs appear is because the one entered at sentencing (DE:27) was later amended (DE:30) to correct a clerical error which had used the date January "2009," when it was supposed to be "2010."

LEE to FPC Millington was because the BOP had classified LEE as a deportable alien which, in turn, precluded camp placement, half-way house, drug-programs, etc.

As a result of the unexpected designation to CCA-Adams, Mississippi, Fitzgerald filed a motion (DE:36) to extend the self-reporting date from February 1, 2010, to April 1, 2010, which the Court granted on January 29, 2010. (DE:37) However, LEE decided to self-report as originally ordered on February 1, 2010, anyway. (DE:38) Relevantly, LEE made this decision because he had already made arrangements for a close friend to help manage his restaurant businesses for the six (6) to ten (10) months "maximum" he expected to be away from them. (See Declaration of LEE, Appdx:88a-93a) Moreover, this friend, as well as other witnesses, can attest that at this time LEE was still operating under the full expectation that he was in no danger of deportation and that he would soon be back to running his restaurants. (Id.)

Upon LEE's surrendering himself to the U.S. Marshalls in Tennessee on February 1, 2010, it took another six (6) weeks for him to get transported and actually arrive at CCA-Adams in Mississippi. Upon his arrival, LEE soon learned that the facility was a not just a prison recently opened by Corrections Corporation of America (CCA) on contract for the BOP, but that it was a special institution which *exclusively* housed federal inmates which were to be deported upon completion of their sentences. (See Declaration of LEE, Appdx:88a-93a)

Shortly thereafter, through prison staff assigned to his "case management," LEE discovered that he was a deportable alien based upon his conviction and

that INS would soon visit with him to initiate deportation proceedings. (Id.) Consequently, LEE immediately contacted Fitzgerald about his predicament. (Id.; see Telephone Records, Appdx:74a-85a) Fitzgerald, however, maintained that LEE must be "mistaken," and that he was "not going to be deported." (Id.) LEE thus re-confirmed with prison staff that it was Fitzgerald who was mistaken because there was no question INS was seeking his deportation.(Id.)

Facing this crisis, LEE then inquired of inmates in the law library about what his "options" were to prevent being deported. (Id.) In this regard, LEE was advised he needed to get a letter from his lawyer confirming the Government had agreed not to deport him, as well as that such was the advice Fitzgerald had given. LEE was likewise advised that he also needed to request Fitzgerald send him a copy of his docket from P.A.C.E.R.; plea agreement; J&C; PSI; discovery; plea change and sentencing transcripts. (Id.)

Accordingly, LEE immediately telephoned Fitzgerald and requested the letter as well as all of the previously noted materials. (Id.) Although this preliminary call and request for information occurred on April 7, 2010 (Appdx:85a), as well as that Fitzgerald assured LEE he would provide all of the requested materials (including the letter confirming to INS that he was not supposed to be deported), nothing ever actually came from Fitzgerald despite more than two (2) dozen documented phone calls by LEE which resulted only in Fitzgerald repeatedly *misrepresenting* the materials were "on the way in the mail." (Id.)

Indeed after more than a month of receiving nothing but unfulfilled assurances, it was only upon threat of a Bar Complaint and notice of intention to request this Court subpoena the prison's recorded phone calls that Fitzgerald finally provided the letter for INS, as well as a few (but not all) of the requested materials. (Id.) With respect to the letter for INS confirming LEE was not supposed to be deported, however, Fitzgerald determinatively wrote:

> "To Whom It May Concern:
>
> There was never any discussion of deportation during the negotiation of the Plea Agreement or during Sentencing. It was my understanding that the Government was not seeking Deportation of Mr. Jae Lee. Please feel free to contact me at my office if needed for further discussion concerning this matter." (emphasis added) (See Appdx:86a-87a, Letter of Fitzgerald to LEE for INS, date May 10, 2010)

Upon receiving the aforesaid letter, LEE still had to further contact Fitzgerald another more than thirty (30) phone calls to request he send the remaining materials which had been requested. (Declaration of LEE, Appdx:88a-93a; see also Telephone Records, Appdx:74a-85a) These included copies of the P.A.C.E.R. Docket, as well as the transcripts of both the plea change and sentencing hearings. (Id.) Again LEE was met with one repeated unfulfilled assurance after another, but no actual materials arriving. (Id.) Accordingly, LEE had an inmate assist him in writing Fitzgerald a stern letter, including a threat of a Bar Complaint, if he did not provide the requested materials; however, LEE still did not receive the materials until his friend (managing LEE's

restaurant) went down to the Memphis District Courthouse and paid for the transcripts himself. (Id.) As a result, LEE was not in possession of all record materials he needed for this §2255 until early-August of 2010. (Id.)

Upon receiving all of the materials and seeking assistance from inmates in the prison law library, LEE was shown case law (such as the Supreme Court's recent Padilla holdings), as well as statues which revealed that Fitzgerald had *affirmatively misadvised* him that he would not be deported despite relevant immigration statutes were succinct and straightforward that the count LEE pleaded guilty to made his deportation a virtual certainty. (Id). Consequently, this §2255 now timely follows.

ARGUMENT

LEE asserts that his sentence was rendered in violation of the Sixth Amendment's guarantee of effective assistance of counsel throughout all critical stages, including pretrial investigation, plea change proceedings, and at sentencing. In this regard, LEE asserts that his attorney, Larry Fitzgerald, esq., independently, as well as cumulatively, rendered ineffective assistance by:

> (1) not only failing to inform LEE that a collateral consequence of his pleading guilty would subject him to deportation, but actually *affirmatively misadvising* him that he would not be deported if he pleaded guilty;
>
> (2) failing to conduct any pretrial investigation into possible defenses, evidence, witnesses, discovery or search warrant deficiencies, potential lesser offense options, and/or ensuring LEE received proper consideration for the

undisclosed benefits the Government received as a result of his plea; and

(3) confusing the Court at sentencing by misrepresenting LEE was a "citizen of the United States," when he was not, and thus, depriving the Court of the knowledge and consideration of a factor (the consequence of deportation) which is commonly relied upon as part of a Court's sentencing discretion.

The Sixth Amendment Law

The Sixth Amendment requires that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence," U.S. Const. Amend. VI, and that such assistance be effective, see Strickland v. Washington, 466 U.S. 668, 686 (1984). To establish a claim for ineffective assistance, LEE must demonstrate "counsel's performance was deficient" and that it "prejudiced the defense." Id. At 687-88. That is, it "must be shown that counsel's representation fell below an objective standard of reasonableness" measured by "prevailing professional norms." Id. Additionally, the reasonableness of counsel's performance is to be evaluated from counsel's perspective at the time of the alleged error and in light of all circumstances. Kimmelman v. Morrison, 477 U.S. 365 (1986). Moreover, because counsel's conduct is presumed to be reasonable, LEE must establish no competent counsel would have taken the action in question. Id.

As to Strickland's second prong - prejudice - LEE must show that there is a reasonable probability the proceedings would have been different absent counsel's unprofessional errors. Id. at 694. A "reasonable probability" is one that is sufficient to undermine

confidence in the outcome. Id. As relevant here, the two-part Strickland v. Washington test applies to challenges to guilty pleas because they operate as a waiver of important constitutional rights, and thus, must be an informed choice among the alternative courses of action open to the defendant. See Hill v. Lockhart, 474 U.S. 52 (1985); see also, Bradshaw v. Stumpf, 545 U.S. 175, 183 (2005). As such, a guilty plea must be voluntarily, knowingly, and intelligently, with sufficient awareness of relevant circumstances and likely consequences. Id.; see also Boykin v. Alabama, 395 U.S. 238, 243 (1969); North Carolina v. Alford, 400 U.S. 25, 31 (1970).

Likewise, it is thus also LEE's burden to establish (absent a plea agreement with different conditions) there was "a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial." Hill, supra. Moreover, this is again an "objective" inquiry, which is dependent on the likely outcome of a trial had the defendant not pleaded. Id.; see also Railey v. Webb, 540 F.3d 393 (6th Cir.2008). In this manner, it is important to distinguish that to establish prejudice under Hill, LEE need *not* show with absolute certainty that a jury would have acquitted him, but demonstrate only there was a reasonable potential for a favorable outcome had he rejected the guilty plea. See Dando v. Yukins, 461 F.3d 791 (6th Cir. 2006).

Separate and apart from the foregoing, the Sixth Amendment also requires counsel to conduct adequate investigations relevant to the advice that attorney renders to his client. Strickland, supra, 466 U.S. at 690-91; see also Wiggins v. Smith, 539 U.S. 510 (2003). In this regard, while strategic choices

made after thorough investigation of law and facts relevant to all plausible options are virtually unchallengeable, strategic choices made after *less than complete investigation* are reasonable only to the extent reasonable professional judgments supports counsel's decision not to investigate. Wiggins, 539 U.S. At 521-22.

In other words, counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary. Id.; see also Carter v. Bell, 218 F.3d 581, 595-96 (6th Cir.2000)(same); Dando, supra (where a failure to investigate does not reflect sound professional judgment, deference is not appropriate); Hawkins v. Coyle, 547 F.3d 540 (6th Cir.2008) (same). Furthermore, the investigation should always include efforts to secure information in possession of the prosecution and law enforcement authorities. (Id.)

Additionally, counsel retains a duty to conduct a prompt investigation of the circumstances of the case and to explore all avenues leading to facts relevant to the merits of the case and the penalty regardless of the accused's admissions or statements to the lawyer of facts constituting guilt, or even the accused's stated desire to plead guilty. See American Bar Association, Standards for Criminal Justice 4-4.1 (2d ed. 1982 Supp.); Rompilla v. Beard, 545 U.S. 374, 387,(2005)(quoting ABA Standards and holding defendant's admission of guilt to his lawyer does *not* absolve the lawyer of his duty to investigate the crime and issues relevant to potential penalties).

Lastly, with respect to sentencing, to establish ineffective assistance a defendant need *not* show "that counsel's deficient conduct *more likely than not* altered the outcome" of his sentencing proceeding,

but he must only establish "a probability sufficient to undermine confidence in that outcome." See Porter v. McCollum, 130 S.Ct. 447, 453 (2009)(quoting Strickland, 466 U.S. at 693-94).

The Effect of Padilla v. Kentucky

Prior to the Supreme Court's relatively recent ruling in Padilla, the law of this Circuit held that deportation was a collateral consequence, and thus, by implication rendered a defendant unable to claim that counsel's failure to advise him of likely deportation was ineffective and/or rendered a guilty plea unknowing and involuntary. See El-Nobani v. United States, 287 F.3d 417, 421 (6th Cir.2002)(holding deportation is not within the control and responsibility of the district court, and hence, is collateral to a conviction).

The Supreme Court in Padilla, however, abrogated *El Nobani*, and instead directed that "advice regarding deportation is not categorically removed from the ambit of the Sixth Amendment right to counsel [and] when the deportation consequence is truly clear, as it was in this case, the duty to give correct advice is equally clear." Padilla v. Kentucky, WL 1222274 (2010). Notwithstanding the foregoing change in law, however, what has always been the case in this Circuit is that an attorney's "affirmative misadvice" about a serious issue deprives a defendant of effective assistance of counsel. See Sparks v. Sowders, 852 F.2d 882 (6th Cir.1988) (holding that gross misadvice concerning parole eligibility constitutes ineffective assistance). Moreover, the misunderstanding of deportation consequences was important. See INS v. St. Cyr, 533 U.S. 289, 323 (2001)(recognizing that preserving client's right to

remain in the United States may be more important than any potential jail sentence").

The Law Applied To Attorney Fitzgerald's Performance

From the outset, LEE acknowledges that there is no dispute the Court at the plea change hearing did advise LEE that there was a possibility of deportation. (See pg# 17-18, supra; see also DE:20 at pg# 9-10; Appdx:38a-39a) However, the law requires this Court to base its assessment on an examination of not just that incident in isolation, but the entire record, evidence, and circumstances as a whole. See Hodge v. Haeberlin, 579 F.3d 627 (6th Cir.2009).

Under such a holistic view, the record shows that preceding the deportation warning, the Court had also cautioned LEE about many other (non-deportation) consequences, to which LEE advised he understood and accepted those consequences *without hesitation*. (See pgs# 17-18, supra; also DE:20 at pgs# 8-10; Appdx:37a-39a) Yet, when the deportation caution was given and the Court asked "Does that at all affect your decision about whether you want to plead guilty or not?", LEE in this instance clearly hesitated and stated: "Yes, Your Honor." (Id.) Moreover, when the Court thus further inquired: "Okay. How does it affect your decision?", LEE advised: "I don't understand." (Id.) Relevantly, it was only after Fitzgerald's brief consultation in LEE's ear advising the "standard caution" was moot because he would absolutely *not* be deported, did LEE agree he "still want[ed] to go forward guilty?" (Id.)

As the Government itself will most likely point out in its ultimate response to the instant §2255 Motion, LEE's claims that Fitzgerald assured him

both before, during, and after the plea change hearing that he would not be deported do not *expressly* appear on the record, but are "he said-he said" allegations recounted only in LEE's Declaration (See Appdx: 84a-88a) Nevertheless, while LEE concedes that his arguments might have had some trouble if the record in this case consisted solely of the deportation caution at the plea change hearing and LEE's post-sentencing Declaration, the Government will also have to concede that the evidence at hand constitutes much more than just the foregoing. For instance, the record shows at sentencing the prosecutor did not appear to believe LEE risked deportation because he agreed that a "factor" weighing "in favor" of LEE was that he was "the owner of this restaurant. . . and appears to have talent in that area and is, by all accounts, in that area performing very well." (See pg# 28, supra; DE:25 at pg# 15; Appdx:67a)

Furthermore, demonstrating that LEE himself clearly didn't realize he risked deportation is that his sentencing allocution was focused solely on being able to operate his business: "I need a second chance so I can continue with my restaurant which I love to do. Thank you." (See pg# 28, supra; DE:25 at pg# 14; Appdx:66a) Moreover, the sentencing record shows that even the Court didn't believe LEE risked deportation, as evidence by its reasoning that issuance of a below-guideline sentence of one year and one day was because it would "allow you to serve a minimum amount of time and you should be able to keep your

restaurant going." (See pg# 28-29, supra; DE:25 at pg# 16-19; Appdx:68a-81a)[15]

Of course, nothing can be more affirming of LEE's claims Fitzgerald gave him misadvice about the risk of deportation than Fitzgerald's own post-sentencing letter to LEE to provide INS which stated: "There was never any discussion of deportation during the negotiation of the Plea Agreement or during Sentencing. It was my understanding that the Government was not seeking Deportation of Mr. Jae Lee." (See pg# 33, supra; Appdx:86a-87a)

Accordingly, LEE respectfully submits that analyzing "the record, evidence, and circumstances as a whole" demonstrate LEE has more than satisfied his burden of establishing that Fitzgerald not only failed to inform LEE that the virtually automatic collateral consequences of his guilty plea was that he would be deported, but that Fitzgerald actually affirmatively misadvised LEE he would not be deported if he chose to plead rather than proceed to trial. Put plainly, even before Padilla, this Circuit's law would have nevertheless held Fitzgerald ineffective under Strickland's first prong. Sparks, supra, 852 F.2d 882.

As discussed supra, as to Strickland's second prong - prejudice - LEE must show that: (1) he would have proceeded to trial had it not been for Fitzgerald incorrectly advising him that he would not be

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[15] Also indicative that the Court didn't realize LEE would be deported was that it also recommended LEE be able to serve his sentence at Federal Prison Camp Millington (which deportable aliens cannot be designated); be allowed to self-report (which is also rare for deportables); and issued a J&C which did not include any of the language typically included when sentencing a deportable defendant. (Id.)

deported; and (2) that a decision to reject the plea bargain would have been rational under the circumstances (i.e. a showing that LEE possessed a reasonable possibility of a successful outcome at a trial). See Hill, supra, 474 U.S. at 59; see also Railey v. Webb, 540 F.3d 393 (6th Cir.2008); Roe v. Flores-Ortega, 528 U.S. 470, 480-486 (2000). As discussed supra, this Court's assessment requires an objective inquiry into the circumstances of the crime, available defenses, amount of evidence, etc. Id.; see also Dando, supra.

For certain, LEE's defense would have had to be sufficient to challenge the Government's case had he gone to trial. As such, it is relevant to look at exactly what the Government stated that case was or, more importantly, what is was not. From a purely legal perspective, an objective inquiry into the circumstances, defenses, evidence, etc., should thus be constrained to the evidence that the Government disclosed in their Rule 16 Discovery Letter, DEA Reports, and upon proffer to the Court at the plea change hearing. That case and evidence being: the Ecstasy pills retrieved as a result of the warrant; LEE and CHU's oral statements to agents; and the Government's proffered intention to use expert testimony eighty-eight (88) pills was an amount more consistent with a trafficker than personal use. (See pgs# 9-12, 19, supra) Elsewise, LEE respectfully submits allowing the Government to now add things to an objective inquiry which they did not disclose at the proper time previously would render superfluous the intended protections of F.R.C.P Rule 16, law-of-the case doctrine, etc.

Under such a view, this case is seen as a very minor compared to typical Ecstasy-based prosecu-

tions with a distribution or trafficking nexus. That is, the actual "offense of conviction" involved only eighty-eight (88) pills at *most*. (DE:2; DE:16; pgs# 9-12, 18, 28, supra) Relevantly, Lee was not charged with simple possession of MDMA, but was charged and pleaded guilty to "Possession With Intent To *Distribute* MDMA." The distinction is critical since the Government would have had to prove a distribution/trafficking link. See United States v. Toler, 144 F.3d 1423(11th Cir.1998)(government must prove what it *charged in the indictment*)(collecting cases).

Of course, the small amount involved would be only one consideration of a jury in considering whether LEE was guilty of "Possession With Intent To Distribute MDMA." However, when reviewing all of the other purported evidence claimed by the Government, it actually favors LEE's simple possession claim. For example, although the Government claimed in discovery that they intended to use the statements of LEE given to agents at the time of the search warrant execution, they do not say that LEE admitted to being a trafficker, but instead that LEE steadfastly maintained he "did not sell the Ecstasy to anybody, [but] would give it away when he would go out to party with friends." (Supra at pgs# 9-12, 18, 28; see also DE:16; Appdx:3a, 12a)

Indeed, the only other witness statement appearing in discovery was that of Amy Chu, LEE's live-in girlfriend of twelve (12) years, who also advised agents at the scene of the search warrant execution that "she never purchased narcotics [but that] LEE would give it to her when they were partying [and] that she had no knowledge of LEE's narcotic trafficking." (Id.) Moreover, when looking through all of

the Government's actual discovery disclosure and evidence proffer at the plea change hearing, the only thing that the Government claimed they would use to establish the distribution element of their prosecution was their stated intention to use experts to testify that "the amount of MDMA recovered [88 pills] was consistent with distribution rather than personal use." (See pg# 18, supra; see also DE:20 at pg# 16-17; Appdx:45a-46a)

While the Government would have been entitled to present experts, LEE submits it isn't anything if not fair to say that just as many experts would testify that eighty-eight (88) Ecstasy pills was a relatively small amount which, at the very least, would have required examining additional factors to determine an inference of trafficking as opposed to personal use. In this vein, LEE submits that the statements of he and his girlfriend claiming personal use only, lack of any prior criminal history, and absence of any other disclosed witnesses to say otherwise, all would have been major factors in dispelling the Government's burden of proving beyond a reasonable doubt that LEE committed a distribution-based offense.[16]

For clarity, while LEE does not suggest that a jury could not have chose to find him guilty by

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[16] Additionally, it would not be unreasonable to say that possessing eighty-eight (88) pills was more consistent with personal use than with distribution in the context of this case (i.e. it involved a person who frequently partied with several friends and gave away multiple pills at a time, and who had the financial means to buy one-hundred (100) pills at a time to significantly reduce his per pill cost). After all, LEE did own two (2) restaurants and had $32,000 in his bank deposit bag.

accepting the expert testimony, he does respectfully submits that it is quite objective to state it would at least have been just as likely for the jury to have rejected the experts, accepted his defense theory, and acquitted him of the count as charged. Pertinently, to establish prejudice, LEE need *not* show with absolute certainty that a jury would have acquitted him, but demonstrate only that there was a reasonable potential for a favorable outcome. Dando, supra.

Notwithstanding the foregoing, LEE recognizes his primary argument discussed above is predicated upon the presumption the Government would not have been permitted to used the *undisclosed* CI-nexus to prosecute him. In this regard, while LEE stands by the assertion that such a claim is proper in light of the law and federal rules, his full arguments nevertheless go beyond just that reliance. Rather, even gratuitously assuming, in arguendo, that the Government could have somehow managed to get the undisclosed CI-nexus into a prosecution of LEE, then it is only fair that the assessment of what would have likely happened at a trial needs to include examination of both sides of the story.

Under such a full context view, the best the Government's case gets is still only a three-hundred and three (303) Ecstasy pill prosecution which would have required going back more than eight (8) years of transactions to aggregate no less. Again, looking at the numbers alone, it is very reasonable for LEE to suggest it was a plausible argument to any jury that the amounts and time spans involved were more attributable to simple possession rather than the hallmarks of a trafficker. While the testimony of the CI claiming he purchased slightly over two-hundred (200) pills from LEE, especially in combination with

the allegation the CI facilitated a fifteen (15) pill "controlled buy" would have no doubt been factors weighed by any jury, the CI would have been subjected to cross-examination and impeachment.

That is, any testimony of the CI about his alleged purchases from LEE would have thus been met with the inescapable fact that the math of two-hundred (200) pills across forty (40) transactions (and eight years) worked out to the CI having only obtained an average of five (5) pills per transaction (i.e. a few times a year). Accordingly, while the jury could have believed the CI's claim such constituted drug trafficking events, the amounts involved could also have been construed as consistent with LEE's defense he never sold any pills, but would only use them personally and give them away when partying. Furthermore, in addition to the testimony of his girlfriend, he would have been able to produce several other witnesses (his friends) who would have testified LEE never sold drugs, but only gave the Ecstasy away while partying, as well as confirmed the CI was a "mooch" and "free-rider." (See Declaration of LEE, Appdx:88a-93a)

In sum, this trafficking-based prosecution would have really boiled down to the jury's credibility assessment of the CI and, as far as credibility goes, even if the Government could have managed to navigate Rule 16 and get the undisclosed CI-nexus into its prosecution, what we do know is use of the CI would have triggered the obligation to disclose all that was related to him. Among other things, this would have included all the DEA Reports of what the CI had claimed, as well as what the "audio recordings" said.

As discussed supra, with respect to the CI's claim he owed LEE $150 for an existing drug debt, the CI had reported to agents he went to LEE's house and paid the debt, as well as that he allegedly observed LEE packaging fifteen (15) Ecstasy pills on that occasion. (Pgs# 20-23, supra; PSI:4) Conversely, LEE's position would have been that the CI lied about having paid the debt at that time; that the CI never saw him packaging any narcotics because LEE told the CI he was trying to quit taking Ecstasy due to the expense and thus did not have any pills; and that LEE rejected the CI's request to do him the "favor" of getting him some pills to party with a new girlfriend. (Pgs# 2427, supra; Appdx:88a-93a)

Relevantly, the vast difference between the version of events as told by the CI and LEE would not have come down to just a credibility contest between the two. Specifically, although it is unknown if there was an "audio recording" of the CI's first visit to LEE's house (purportedly to pay the debt), if there was, then the CI would have been completely exposed as a liar. Of course, the reason we do not know how many audio recordings there might have been was because the Government never disclosed the CI-nexus in their Rule 16 Letter or evidence proffer at the plea change hearing. Indeed, even when the CI-nexus "appeared" in the PSI, it only referenced one (1) audio recording (of the controlled-buy), but without revealing what that recording actually said.

Nevertheless, even without any audio evidence, the CI's story would have been exposed through LEE and (his companion accompanying him) testifying that he picked up from the CI's mailbox the same $150 more than a week after the CI had untruthfully reported to agents he had purportedly already paid

it. Moreover, as discussed supra, what we do know is that the alleged controlled buy of fifteen (15) pills was at least purportedly conducted with the CI having been outfitted with an audio recording device. Accordingly, the inconsistencies of the CI's claims about the drug debt, packaging of pills, etc., would have nevertheless been revealed as untruthful here because LEE again discussed having retrieved the $150 debt from the CI's mailbox on this occasion as well.

Thus, as LEE would have argued it to the jury, after LEE telling the CI he had no Ecstasy because he was quitting, the CI decided to tell the agents he paid the debt, but instead actually pocketing the $150 in Government funds for himself. To make his handlers happy, however, he told them the lie that he observed LEE packaging fifteen (15) Ecstasy pills. Unfortunately, the CI's lies to agents only got him into more trouble because they now wanted the CI to conduct a controlled buy for pills which the CI knew LEE didn't actually have.

Facing this dilemma, the CI then began his spree of more than three (3) dozen calls over a one (1) week period (provable through cell phone billing records), wherein he pleaded with LEE to do him a "favor" of getting him some pills to party with a new girlfriend. Although, LEE rejected these pleas at first, after being "stalked" by the CI, LEE ultimately agreed to the "favor" just to get the CI to stop calling him. Now, however, the CI knew he needed to cover the $150 for the drug debt for the unpaid "split" on the ounce of marijuana, as well as come up with the $300 to cover the cost of LEE's doing the favor of picking up the pills. Unfortunately, this created another problem for the CI because the fifteen (15) pill pick-up would be a controlled buy watched by agents, and

probably with the CI "wired." As such, the CI could not just walk in with $450 on the buy date because that would have caused the agents to realize he had lied to them about paying the $150 previously.

Accordingly, as the jury would have been offered, this was why the CI had to tell LEE to come to his (CI's) house and pick-up the money from his mailbox, as well as why in order to induce LEE into doing him the "favor" of getting the pills (which the CI knew LEE would otherwise not do), the CI had to tell LEE he would have the whole $450 for him (the $150 debt plus the $300 to cover the pills so as not to be a mooch). (Pgs# 24-27, supra; Appdx:88a-93a[17]

Further problematic, however, was that the CI could not provide the $450 as promised to LEE, but needed to hold back $300 to conduct the controlled buy. In turn, this is why when LEE (and his companion) arrived at the CI's house and retrieved the envelope from the mailbox, it only contained the $150 and a note stating that "this is all I have right

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[17] The CI knew LEE would not be willing to do him the favor of getting some Ecstasy pills because LEE had told him he was trying to quit. In this same vein, the CI also knew that he would not only need to cover the $150 for the unpaid split on the marijuana ounce, but that he would have to cover the $300 for the pills he wanted LEE to get him as a "favor" (i.e. cover the costs, but without remuneration to LEE). That is, unlike what had occurred in the past when LEE was a frequent user, LEE would be unwilling to provide the pills gratis (i.e. at LEE's personal expense), because he himself was trying to stop using pills and had complained that part of his reasoning was the expense of the habit and the downturn in income from his restaurant businesses. In sum, as relevant to entrapment defense discussed infra, the CI had to induce LEE into doing what he was not predisposed to doing otherwise.

now." (Id.) Of course, where the CI's problems got worse is when he conducted the controlled buy while wearing a recording device. (Pgs# 21-22, supra; PSI:4) That is, LEE berated the CI for the mailbox issues (i.e. telling him that $450 was there when only the $150 was). (Pgs# 24-27, supra; Appdx:88a-93a) As such, among other exculpatory comments (infra), *that* audio recording would have also exposed the CI had lied to agents about previously paying the $150 debt (and thus by reasonable inference about seeing any pills at that time either), as well as that the CI had engaged in the mailbox endeavor in an effort to cover up his past deception with law enforcement.

In addition to all of the foregoing, further detracting from the ability of the Government to rely on the CI to prove a *distribution/trafficking-based* case, as well as bolstering LEE's version of events, we must remember that the PSI reported the first visit by the CI to LEE's residence where he purportedly observed LEE packaging fifteen (15) Ecstasy pills, occurred on December 2, 2008. (Pg# 2, supra; PSI:4) Yet, the PSI reports that the later alleged controlled buy of fifteen (15) Ecstasy pills did not occur until nine (9) days later, on December 12, 2008. (Id.)

Based on just the foregoing alone, LEE submits it is very objectively reasonable for him to assert that a jury could have been persuaded it was questionable that, according to the CI, LEE was supposedly a drug-trafficker (who had been observed packaging fifteen (15) pills no less), but that it took another more than nine (9) days to fill that same, small fifteen (15) pill order. Such is consistent with LEE's version of events (and entrapment defense) that he did not have any pills when the CI visited the first instance. (See pg# 24-27, supra; Appdx:88a-93a)

Moreover, agents did not obtain and execute their search warrant until another four (4) weeks later, on January 7, 2009. (Pgs# 9-10, supra; DE:16; Appdx:9a-16a) Pertinently, during that *entire month interim*, the CI did not try to conduct any further controlled buys with LEE. More importantly, the amount of Ecstasy recovered by the search warrant showed not only that LEE never sold any of the one-hundred pills he had got from his source, but that consistent with his claims of trying to quit, he hadn't even used any personally. (Id.; see also, supra at pgs# 9, n.4; 19, n.5; & 27, n.12)

Most respectfully, this is just yet another example of where it is reasonable to suggest that a jury very probably could have accepted LEE's defense he was not a drug-dealer, but only bought pills for his and his friend's *personal* use when partying, as well as that after initially and repeatedly refusing, LEE was only induced by the CI into doing him a "favor" of getting some pills (without remuneration) because of his three (3) dozen calls later that week and the CI's plea for LEE's help so he could party with a new girlfriend. (See pg# 24-27, supra; Appdx:88a-93a)

Indeed, as discussed supra, use of the CI at any trial would have required disclosure of phone records and what the audio recordings contained. At a minimum, the phone records, would have confirmed the more than three (3) dozen phone calls by the CI to LEE within the one-week period after the CI's initial visit to LEE's residence. Furthermore, audio recordings would have showed that when the CI came to pick up the pills, LEE berated the CI for having "stalked" him and the "B.S." about the mailbox incident. (Id.) In fact, the same recording would have showed LEE's *reiteration* to the CI that it was only

because of his persistence that he had got the pills, as well as that he was really trying to "cut-back" on the "expensive habit" of taking Ecstasy, and that this had been the "first time in a very long time" that LEE had even gone to his source for pills. (Id.)

As such, not only could have LEE very reasonably and objectively argued to the jury that his conduct in relation to the CI and controlled buy was consistent with LEE's personal use/simple possession defense, as opposed to the distribution/trafficking-based count he was actually charged with (i.e. drug dealers typically do not need to be stalked by their customers to buy narcotics; drug dealers would not go an entire month without making a sale; etc.), but this same evidence would have also engendered LEE with the availability of a strong entrapment defense that LEE was not predisposed to drug trafficking, but was a personal user who possessed Ecstasy for himself and/or gave it away to friends when partying. As this Court is aware, entrapment is an absolute defense. See United States v. Nelson, 922 F.2d 311 (6th Cir.1990).

Plainly put, in respect to the entire CI-nexus as whole, if the Government were to say here in these §2255 proceedings that the undisclosed CI-nexus was somehow powerful enough to have secured a conviction if LEE had gone to trial, then it begs the question as why they did not display such confidence during the pretrial proceedings. That is, if the CI-related issues actually strengthened their case, then it is hard to imagine any prosecutor who would not have wanted to flaunt these strengths in discovery and in an evidence proffer. LEE respectfully submits the fact the Government uncharacteristically did not do so cannot be ignored.

In fact, LEE further submits that the Government's non-disclosure of anything related to the CI (including not even being confident enough to provide a copy of the search warrant or supporting affidavit), is indicative that said decision was not a mere oversight, but one of necessity due to Government's realization of the problems attendant to the CI and his credibility Government realized. Indeed, the Government likely had no choice but to bypass the CI-nexus because to do so would have been to countenance the suborning of perjury which, as we know, the Government may not do. See Nix v. Whiteside, 475 U.S. 157 (1986).

Under any circumstances, LEE submits that in making an objective inquiry into whether he had a reasonable possibility of a favorable outcome at trial, it should be remembered that a standard "reasonable doubt" instruction advises the jury that doubt "proof beyond a reasonable doubt is proof of such character that an ordinary person would be willing to rely and act upon it in the most important of his or her own affairs." See White v. Mitchell, 431 F.3d 517 (6th Cir.2005). Most respectfully, LEE submits that under the circumstances and evidence in this case, it is reasonably objective for him to say a jury would have been unwilling to act on anything the CI said in even the unimportant of their affairs.

Additionally, it is relevant to note that after his sentencing and arrival in prison, LEE has communicated with friends which were those that would "party" with him, but were never charged by the Government. According to them, information has been circulating that use of the CI had become so problematic and undesirable for the Government that LEE's arrest was done so prosecutors could

essentially use LEE as a surrogate to the CI for purposes of assisting their efforts in other cases. (See Appdx:88a-93a) Specifically, LEE has been advised that the "word on the street" is that the CI had proved so unreliable, untruthful, and scandalous, that the Government risked damage to the prosecutions of numerous high-level drug traffickers they were trying to build a case upon. (Id.) Relevantly, one of these traffickers was LEE's source (Gum Lum) for buying pills, and with whom use of the CI for any prosecution had become a "problem." (Id.)

Although LEE concedes he has injected part speculation, it is not without some firmer basis that he can confidently say that he has reason to strongly believe his arrest was to help prosecutors with their significant Gum Lum case (as well as others). That is, LEE has been advised prosecutors were able to negotiate a plea agreement with Gum Lum through *representing* to he and his attorneys that LEE was pleading guilty and would be testifying against Gum Lum. (Id.) In turn, Gum Lum's plea led to prosecutors ability to pressure and negotiate several other pleas, cooperation, and/or prosecutions with numerous even higher-level traffickers. (Id.)

Even though LEE's current information does not come from an "official source," it would not be difficult to determine its validity. Pertinently, if true, LEE was unaware of any of this, and thus, Fitzgerald would have rendered ineffective assistance because his failing to investigate LEE's case which, in turn, would have included talking to the attorney's in related cases. Thus, the lack of investigation caused Fitzgerald not to ensure that LEE receive consideration for the benefits the Govern-

ment received through LEE pleading guilty. See Dando, supra.

Moving on, and notwithstanding any of the issues discussed thus far, another "option" that was available to LEE was the ability to challenge the underlying search warrant based on 4th Amendment grounds. As discussed supra, at no time in this case, discovery or otherwise, did the Government provide a copy of the search warrant or its supporting affidavit. In fact, nowhere did the Government even disclose the underlying justification as to why and how the search warrant was obtained. Rather, it was only through the PSI that we are left to *presume* that the search warrant was perhaps based solely upon the undisclosed CI-nexus. (PSI:4-5)

Although LEE takes the position he was entitled to the search warrant and any supporting affidavits *before* he pleaded guilty, regardless of whether or not the Government wanted to include the CI into its case, there at least can be no question that the warrant, etc., would have been required disclosure if the Government had stated any intention to use the CI-nexus. In any event, the search warrant affidavit was ostensibly based on the same claims from the CI that later appeared as part of the PSI. Accordingly, just as LEE has demonstrated herein that the CI claims have been shown to have constituted material untruths and omissions of relevant information, so to would have been the ability for LEE to challenge the validity of the search warrant's predicate. As this Court also knows, every possible charge imaginable in this case would have required dismissal if the validity of the search warrant could not be sustained.

Importantly, the fact that Fitzgerald did not even request to see the search warrant, let alone consider

challenging it despite LEE's advising him of all the inconsistencies relevant to the CI (see pgs# 24-27, supra; Appdx:88a-93a), also demonstrates an independent ground in support of LEE's overall Sixth Amendment claims. Specifically, as a threshold consideration, the failure to request a copy of the search warrant or even at least investigate possibly challenging it does *not* constitute *sound* professional judgment under the law. Hawkins v. Coyle, supra, 547 F.3d 540 (investigation should always include efforts by counsel to secure information in possession of prosecution and law enforcement).

Furthermore, Fitzgerald cannot claim that his decision to forgo any review or consideration of the search warrant was based upon his belief such was unnecessary in light of LEE's decision to plead guilty. See Rompilla v. Beard, supra, 545 U.S. at 387, (2005)(quoting ABA Standards and holding defendant's decision to plea, or even his admission of guilt, does *not* absolve the lawyer of his duty to investigate the crime and issues relevant to penalties the client will face).

CONCLUSION

LEE respectfully submits that he has met his burden of establishing that, absent a plea agreement with different conditions or charges, there was "a reasonable probability that, but for [Fitzgerald's] errors [of affirmatively misadvising him that he would not be deported if he pleaded guilty], he would have insisted on going to trial." Hill, supra, 474 U.S. At 52.

LEE further submits that an "objective" inquiry into whether he had a reasonable potential for a favorable outcome at trial had he rejected the plea

has also been firmly established. Id.; see also Railey v. Webb, supra, 540 F.3d at 393; Dando, supra 461 F.3d at 791. Specifically, an "objective inquiry" in this case reveals:

> (1) a complete lack of trafficking or distribution evidence to support the count LEE was indicted upon and pleaded guilty to;
>
> (2) the existence of extensive exculpatory evidence and witnesses to support LEE's defenses;
>
> (3) that even if the Government could have used the CI-nexus at any trial (despite never disclosing it during discovery or the evidence proffer at the plea change hearing), there would have nonetheless been severe credibility problems and provable inconsistencies which would have clearly weighed favorably against any jury finding LEE guilty beyond a reasonable doubt of the offense he was charged with;
>
> (4) an independent ability to challenge and suppress the search warrant, which would have resulted in dismissal of *any* charges; and
>
> (5) the otherwise availability of a strong entrapment defense.

Independent of the foregoing, but nevertheless cumulative, LEE respectfully asserts that he has also established Fitzgerald was ineffective by completely failing to investigate any possible defenses, witnesses, discovery issues, etc. See Wiggins, supra 539 U.S. at 510. Furthermore, Fitzgerald's decision not to investigate anything and instead recommend LEE accept what amounted to a "low risk" conveni-

ence plea cannot be given deference or deemed strategic, because Fitzgerald's advice was based on his *misunderstanding* of the law and misrepresentations to LEE that he would not be deported *if* he accepted the plea. See Bradshaw, supra, 545 U.S. at 183; see also Dando, supra, 461 F.3d at 799.

Lastly, LEE asserts Fitzgerald also rendered constitutionally deficient performance at sentencing when he misadvised the Court that he was a "citizen of the United States," when LEE clearly was not. (pg# 27-28, supra; also Appdx:62a) Specifically, by misrepresenting LEE was a U.S. citizen, the Court was deprived of the knowledge of a commonly relied-upon factor used by Court's consistent with their sentencing discretion under the *advisory* Guideline regime. Thus, Lee has established that there is a reasonable probability he would have received a different sentence. Porter, supra, 130 S.Ct. U.S. at 453.

Based on all of the foregoing, LEE respectfully request that this Honorable Court set aside his conviction, sentence, and guilty plea as being rendered in violation of the Constitution's Sixth Amendment guarantee to effective assistance of counsel.

Respectfully submitted,

_____

Jae Lee, pro se
Reg# ~~62711-147~~ 22715076
Adams County Correctional
P.O. Box 1600
Washington, MS 39190

CERTIFICATE

I declare under penalty of perjury that the foregoing is true and correct and that this Motion under 28 U.S.C. §2255 was filed by hand directly with the Clerk of the Court on September 24th, 2010.

_____

Jae Lee, pro se

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION

JAE LEE, Movant, v. UNITED STATES OF AMERICA Respondent.	))))))))	Case No.: _____ (2:09-CR-20011-D)

MOVANT'S APPENDIX OF EXHIBITS

(RE: 28 U.S.C. §2255 MOTION TO VACATE CONVICTION AND SENTENCE)

Movant, JAE LEE, pro se, respectfully files this "Appendix of Exhibits" containing the relevant record material and evidence in support of his separately filed Motion pursuant to 28 U.S.C. §2255. This package contains the following:

DOCUMENT	PAGE
1. LEE'S INDICTMENT (DE:2)	1a
2. NOTICE AND RECEIPT OF FOREIGN PASSPORT (DE:12)	2a
3. GOVERNMENT'S RULE 16 DISCOVERY LETTER (DE:16)	3a-8a
4. DEA INVESTIGATION REPORT (DE:16)	9a-16a
5. MEMORANDUM OF PLEA AGREEMENT (DE:21)	17a-19a
6. JUDGMENT & COMMITTAL ORDER (DE:27)	20a-24a
7. CORRECTED JUDGMENT & COMMITTAL ORDER (DE:30)	25a-29a

Continued On Next Page....

DOCUMENT	PAGE
8. PLEA CHANGE HEARING TRANSCRIPTS (DE:20)	30a-52a
9. SENTENCING HEARING TRANSCRIPTS (DE:25)	53a-73a
10. POST-SENTENCING TELEPHONE RECORDS OF LEE	74a-85a
11. POST-SENTENCING CORRESPONDENCE OF ATTORNEY FITZGERALD TO LEE FOR INS	86a-87a
12. LEE'S DECLARATION	88a-93a

CERTIFICATE

I declare under penalty of perjury that the foregoing are true and correct and that this "Appendix of Exhibits" was filed by hand directly with the Clerk of the Court on September 24, 2010.

Jae Lee, pro se
Reg# 62711-147
Adams County Correctional
P.O. Box 1600
Washington, MS 39190

[SEAL] U.S. Department of Justice
United States Attorney
Western District of Tennessee

800 Federal Office Building Telephone (901)544-4231
Memphis, Tennessee 38103 Fax (901)544-4230

March 3, 2009

Larry E. Fitzgerald
Fitzgerald & Harris
An Association of Attorneys
100 North Main Bldg., Suite 901
Memphis, TN 38103

Re: *United States vs. Jae Lee*
a/k/a "Jae L. Williams"
Cr. No. 09-20011-BBD

Dear Mr. Fitzgerald:

This letter is in response to your request for discovery in this case, dated February 11, 2009, and received February 12, 2009.

1. As to Rule 16(a)(1)(A) and (B):

a) On or about January 7, 2009, in the presence of DEA TFO Brunson and DEA TFO Stauffer, the defendant made an oral statement after being advised of his Miranda Rights per DEA card 13. The defendant stated in substance, "I have some Ecstasy pills in a cigarette box in the dining room area. All of the narcotics recovered from the residence are mine. I did not sell the Ecstasy to anyone. I gave it away. I smoke marijuana on a regular basis. I used what little marijuana I had before the execution of the search

warrant. I use the rifle for protection. I purchased it from someone off the street for $100.00 a few years ago."

2. As to Rule 16(a)(1)(D), enclosed is a copy of your client's prior criminal history. Pretrial services also has provided you with a copy of your client's record. Should this matter proceed to trial and your client testify, the government will seek to introduce as impeachment evidence your client's prior convictions. If your client disputes any of the dates of conviction, conviction offenses, dates of release, sentences, or sentencing agencies as described on the criminal history, please contact me as soon as possible. In addition, should this matter proceed to trial and your client testify, the government will seek to introduce as impeachment evidence any felony convictions that are more than ten years old, pursuant to Rule 609(b) of the Federal Rules of Evidence, and any aliases, pursuant to Rule 608 of the Federal Rules of Evidence.

3. As to Rule 16(a)(1)(E), please be advised that government plans to introduce the following physical evidence at trial:

a) $32,432.00 United States currency

b) Check book for Mandarin Palace, banking records for Bank of America in the name "Amy Chu," and papers with names and numbers (recovered from a blue bag in the living room of the residence)

c) One brown wallet containing miscellaneous papers, records, and documents, and a set of keys recovered from the defendant's pants pocket

d) One brown briefcase with miscellaneous papers, records, documents, and photographs relating to Mandarin Palace, and a black notebook with names and numbers, recovered from the dining room area of the residence

e) Eight blue tablets ("Ecstasy," or MDMA) recovered from a cigarette box on the bookcase in the dining room area of the residence

f) Eight-eight blue tablets ("Ecstasy," or MDMA) recovered from a plastic bag in the bookcase in the dining room area of the residence

g) Plastic bag with three orange tablets from box underneath bed in master bedroom

h) Norinco Model 90 rifle with magazine loaded with 25 rounds of ammunition, found in master bedroom closet

i) 2001 Nissan Maxima, TN license plate 406-LPH

j) 1991 Honda Prelude, MS license plate DDF-134

k) Photographs of ecstasy pills (enclosed, on disc)

1) Photographs taken during execution of search warrant (enclosed, on disc)

Enclosed herein are copies of the photos (on disc). All items of physical evidence are available for copying and inspection by making arrangements with this office. Also provided are copies of the following documents: DEA Form-6 dated 1/20/09, DEA Form 7

dated 1/12/09, DEA Form 48a dated 1/22/09 (2), State of Tennessee Drug Asset Forfeiture Warrant, DEA Form 7a dated 1/12/09, SCSO Arrest Ticket and Affidavit of Complaint, photocopies of credit cards and handwritten notes (3 pages), photocopies of checks, handwritten notes, and bank records (10 pages), and an evidence log for the firearm.

4. As to Rule 16(a)(1)(F), the controlled substances recovered by law enforcement in this case were submitted to the laboratory for analysis. The laboratory reports will be provided as soon as they are available.

5. As to Rule 16(a)(1)(G), the government intends to introduce the following expert testimony:

a) A forensic sc[ient]ist/laboratory chemist will testify as an [expert] witness with respect to the series of tests performed on the controlled substances recovered in this case. This expert will testify that these tests yielded results consistent with the aforementioned laboratory reports. Documents summarizing this expert's testimony and qualifications will be provided to you before trial.

b) It is also anticipated that the United States will call Task Force Officer ("TFO") Michael Chipman as an expert at trial. TFO Chipman is a Memphis Police Department ("MPD") Officer currently assigned to the Drug Enforcement Administration ("DEA") Task Force for Western Tennessee. TFO Chipman has been employed by the Memphis Police Department for approximately 14 years. Chipman was

assigned to the DEA in 2007. Prior to that time TFO Chipman was assigned to the MPD Organized Crime Unit. TFO Chipman has received specialized training and experience in narcotics investigations, and has received DEA Basic Narcotics Training and Advanced Narcotics Training. It is anticipated that the United States will call TFO Chipman as an expert at trial in the field of narcotics investigation. TFO Chipman is expected to testify as an expert on drug trafficking "tools of the trade" as well as the modus operandi used by drug traffickers to traffic in hydroponic marijuana, "Ecstasy" (MDMA) and other controlled substances within the United States and in Western Tennessee. TFO Chipman is expected to that the defendant followed the drug trafficking modus operandi to traffic in controlled substances, including hydroponic marijuana and "Ecstasy" (MDMA). Officer Chipman is also expected to testify about hydroponic marijuana and "Ecstasy" (MDMA) quantities and prices, and related matters.

c) The United States also intends to call Keith Brown as an expert witness. Keith Brown has been employed in law enforcement since 1993, where he was initially employed with the Virginia Alcoholic Beverage Commission Board. In 1995, Brown was employed by the DEA, where he is currently the Group Supervisor of the Memphis Resident Office. Brown attended the DEA academy. He has also received specialized drug enforcement training with the DEA, including but not limited to complex conspiracy training and money

laundering training. It is anticipated that the United States will call Agent Brown as an expert at trial in the field of narcotics investigation and the execution of search warrants. Agent Brown is expected to testify as an expert on drug trafficking "tools of the trade" as well as the modus operandi used by drug traffickers to traffic in hydroponic marijuana, "Ecstasy" (MDMA), and other controlled substances in Western Tennessee. Agent Brown is expected to testify that drug trafficking "tools of the trade" were employed by the defendant in this case, and that defendant followed the drug trafficking modus operandi to traffic in hydroponic marijuana and "Ecstasy" (MDMA). Agent Brown is also expected to testify about drug trafficking codes and signals used by narcotics smugglers to communicate with each other, hydroponic marijuana and "Ecstasy" (MDMA) quantities and prices, and related matters. Agent Brown also will testify as to the process by which the DEA maintains, preserves, and destroys drugs that are seized as part of investigations.

7. As to possible Rule 404(b) evidence, please be advised that the government may introduce evidence of like and similar conduct or other crimes evidence involving your client, and will provide you with notice if we decide to submit such evidence.

8. The govern[ent] is presently unaware of any exculpat[ory evi]dence regarding your client in this case, but is cognizant of its continuing obligation pursuant to *Brady v. Maryland*, 373 U.S. 83 (1963),

to make same available in a timely manner, should it exist. Additionally, the government is aware of its continuing obligation to make any impeachment evidence available in a timely manner, should it exist.

9. If upon receipt, you do not find an item referenced as being enclosed with this letter, please contact me immediately.

10. The government hereby requests any and all reciprocal discovery and notice to which it is entitled pursuant to Rule 16(b), the local rules, and applicable case law. Please consider this request for reciprocal discovery a continuing request under Rule 16.

11. Please feel free to contact me at (901) 544-4231 if you have any questions.

Very truly yours,

LAWRENCE J. LAURENZI
United States Attorney

By s/ Arun G. Rao
ARUN G. RAO
Assistant United States Attorney
167 N. Main Street, Ste. 800
Memphis, TN 38103
(901) 544-4231

Enclosures

cc: Clerk of the Court (W.D. Tenn.) (without enclosures)

CERTIFICATE OF SERVICE

I, Arun G. Rao, hereby certify that the on the date below, I electronically filed the foregoing with the Clerk of Court for the Western District of

Tennessee via the Electronic File System which sent notification of said filing to: **defense counsel**.

s/ Arun G. Rao
ARUN G. RAO

March 3, 2009

PRIOR RECORD:

A national and local criminal record inquiry revealed the following information for Jae Lee.

FBI#: 711869CD8 RNI#: 203417
Alias: Jae Williams, Jua Lee

Date	Agency	Charge	Disposition
09/26/1993 (Age: 24)	General Sessions Memphis, TN	1) Public Intoxication 2) Disorderly Conduct	9/27/1993: 1) Nolle Prosequi 2) Guilty, $50 fine (v)
01/07/2009 (Age: 39)	General Sessions Memphis, TN	1) Possession of a Firearm During a Dangerous Felony 2) Possession of a Controlled Substance with Intent to Manu/Del/Sell	1) and 2): Pending, set for hearing on 2/6/2009, released on $10,000 bond
Circumstances : The above charges appear to relate to the federal indictment. The affidavit of complaint asserts that officers executed a search warrant at the case address. A search of the residence allegedly recovered 88 ecstasy pills, 3 valium pills, a large amount of U.S. currency and a loaded MK90 assault rifle.			

U.S. Department of Justice
Drug Enforcement Administration

REPORT OF INVESTIGATION Page 1 of 7

1. Program Code 2. Cross Related Files 3. File No.
File 4. G-DEP Identifier
5. By: TFO ☐ [3. & 4. Redacted]
Dennis Brunson ☐ 6. File Title
At: Memphis RO ☐ LUM, Gum
☐

7. ☐ Closed ☐ Requested Action 8. Date Prepared
Completed 01/20/09
☐ Action Requested By:

9. Other Officers:

10. Report Re: Execution of Federal Search Warrant at 8288 George Brett, Cordova, TN and Acquisition of Drug Ex. 20 through 22 and Non-Drug Ex. N-50, N-57, N-81 thru N-84

SYNOPSIS

On January 7, 2009, at approximately 6:00 a.m., members of the Memphis Resident Office and the Memphis Police Department executed a Federal Search Warrant at 8288 George Brett, Cordova, Tennessee the residence of Jae LEE. Pursuant to a search of the resident officers recovered eighty-eight (88) Ecstasy (MDA) tablets, three (3) Valium tablets, one (1) Norinco rifle with twenty-five (25) rounds ammunition, and numerous papers, records, documents, and photographs. Officers/Agents seized a 2001 Nissan Maxima bearing Tennessee license number 406LPN, with vin: JN1CA31D31T814241 and 1991 Honda Prelude bearing Mississippi license number DDF134, with vin: JHMBA4137MC027236. LEE claimed ownership of the Ecstasy tablets and

Valium tablets and was arrested on the State Charges of Possession of a Controlled Substance with Intent to Manufacture Deliver or Sell to wit Ecstasy and Valium, (TCA 39-17-417) and Possession of a Firearm During the Commission of a Felony, (TCA 39-17-1324).

DETAILS

1. On January 6, 2009, DEA Task Force Officer Michael Chipman presented an affidavit in regards to the search 8288 George Brett Dr., Cordova, Tennessee, the residence of Jae LEE, to Western District of Tennessee United States Magistrate Judge Tum Pham. Judge Pham reviewed the affidavit and issued a search warrant for the aforementioned location.

11. Distribution:	12. Signature (Agent)	13. Date
Division	TFO Dennis Brunson	01/26/09
District	14. Approved (Name and Title)	15. Date
	Keith Brown	01/26/09
Other	Resident Agent in Charge	

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U.S. Department of Justice
Drug Enforcement Administration

REPORT OF INVESTIGATION

(Continuation)

1. File No. 2. G-DEP Identifier
[1. & 2. are Redacted]
3. File Title
LUM, Gum
4. Page 2 of 7
5. Program Code
6. Date Prepared
01/20/09

2. On January 7, 2009, at approximately 6:00 a.m., DEA Task Force Officers D. Brunson, G. Stauffer, Memphis Police Lt. H. Williams, Memphis Police Officers C. Oslanzi, J. Robinson, H. Tellez, R. Trantham, K. Robinson, T. Pinks, K. Hailey, J. Graves and K. Crosby met at a prearranged location then travel to 8288 George Brett Dr., Cordova, Tennessee to executed the outstanding search warrant. Officers/Agents knocked on the front door of the aforementioned location for approximately one (1) minute with no response. Officers/Agents forced entry to the front door. Officers/Agent found the residence occupied by Jae LEE and Amy Eva CHU in the master bedroom. CHU and LEE were secured without incident.

3. TFO's Brunson and Stauffer advised LEE of the Federal search warrant for his residence. TFO Stauffer advised LEE of his Miranda Rights per DEA card 13 as witnessed by TFO Brunson. LEE stated that he understood his rights and wished to talk to the officers/agents. LEE stated that he

had some Ecstasy pills in a cigarette box in the dinning room area.

4. Prior to searching the residence Officer Pinks and his K-9 partner (RIP) who is trained in the detection of narcotics odors (marijuana, cocaine, heroin, methamphetamine and MDMA) examined the residence. RIP alerted for the presence of narcotics in the dinning room area, in the living room area on a blue bag and the master bedroom dresser drawer.

5. Officer/Agents conducted a systemic search of the residence and recovered the following:

Living Room area

Exhibit N-50 is $32,432.00 U. S. Currency recovered from a blue bag next to the couch in the living room by TFO Brunson. TFO's Brunson and Stauffer photographed the exhibit (Ex. N-50b) prior to placing the currency into a DEA Self-Sealing Evidence Envelope (SCEE) money bag (Ex. N-50a).

Exhibit N-83 is a check book for the Mandarin Palace, Banking records for Bank of America in the name of Amy CHU, (account number [REDACTED])

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[DEA Form 6a header and footer omitted for the remainder of original pages 3 through 7]

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misc., papers with names and numbers recovered from a blue bag in the living room by TFO Brunson.

LEE'S Person

Exhibit N-82 is one (1) brown wallet containing misc., papers, records, and documents, set of keys which was recovered from LEE's pants pocket by TFO Brunson.

Dinning Area

Exhibit N-84 is a DEA box containing a brown brief case with misc., papers, records, documents and photographs pertaining to the Mandarin Palace, and a black note book with names and numbers which was acquired by TFO Brunson from the dinning room area of the residence.

Exhibit 20 is eight (8) blue tablets (Ecstasy) recovered from a cigarette box found on the book case in the dinning room area of the residence by TFO Brunson.

Exhibit 21 is eighty-eight (80) blue tablets (Ecstasy) recovered from a plastic bag founded in the book case in the dinning room area of the residence by TFO Brunson.

Master Bedroom

Exhibit 22 is a plastic bag containing three (3) unknown tablets which was recovered from a box hidden underneath the bed in the master bedroom by TFO Brunson.

Norinco, Mod: 90, serial NO: 616901, 7.62X39, rifle with magazine loaded with twenty-five (25) rounds of 7.62X39 ammo found in the master bedroom closet by TFO Brunson.

6. TFO's Brunson and Stauffer seized a 2001 Nissan Maxima bearing Tennessee license number 406LPH, with VIN: JN1CA31D31T814241 (Exhibit N-57), (register to Alfred CHU) from LEE. The vehicle was towed to Bartlett Towing lot located at 1807 Bartlett Road, Memphis TN., for storage. Exhibit N-57 is pending Federal seizure procedures.

7. TFO's Brunson and Stauffer seized a 1991 Honda Prelude bearing Mississippi license number DDF134, with VIN: JHMBA4137MC027236, (register to Fu Hua CHEN) from LEE. The vehicle was towed to Bartlett Towing lot located at 1807 Bartlett Road, Memphis TN., for storage. On January 20, 2009, TFO's Brunson and J. Pike transported the vehicle to the West Tennessee Drug Task Force storage lot where it is pending State of Tennessee seizure procedures.

8. Prior to transporting LEE to the Memphis Resident Office he (LEE) advised TFO's Brunson and Stauffer that all the narcotics recovered from his residence were his. LEE further stated that he had used both the vehicles to transport the narcotics when he would go out to party with friends. LEE stated that he did not sell the Ecstasy to anybody, but would give it away. LEE stated that he smoked marijuana on a regular basis; however he had used what little marijuana he had prior to the officers/agents executing the search warrant at his residence. LEE stated that

he used the rifle for protection and that he purchased it from someone off the street for $100.00 a few years ago. TFO's Brunson and Stauffer maintained custody of the rifle with ammo transported it to the Memphis Police Property and Evidence Room was it was tagged under receipt number 0901000354sh.

9. LEE was processed at the Memphis Resident Office and TFO's Brunson and Stauffer transported LEE to the Shelby County Jail, 201 Poplar, Memphis, Tennessee. LEE was charged with the State charges of Possession of a Controlled Substance with Intent to Manf/Del/Sell to wit Ecstasy (TCA 39-17-417) and Possession of a Firearm during the Commission of a dangerous felony (TCA 39-17-1324).

10. TFO Stauffer advised Amy CHU of her Miranda Rights per DEA card 13 as witnessed by TFO Brunson. CHU stated that she understood her rights and wished to talk to the officers/agents. CHU stated that she had used Ecstasy and Marijuana with LEE. CHU stated that she never purchased narcotics. CHU stated that LEE would give it to her when they were partying. CHU stated that she had no knowledge of LEE's narcotic trafficking. CHU was released at the scene.

CUSTODY OF EVIDENCE

1. Pursuant to the execution of a Federal Search Warrant at 8288 George Brett, Cordova, Tennessee the residence of Jae LEE on January 7, 2009, TFO's Brunson and Stauffer seized Exhibit 20, eight (8) blue tablets (Ecstasy) from a cigarette

box found on the book case in the dinning room area of the residence. TFO's Brunson and Stauffer maintained custody of the exhibit, transporting it to the Memphis Resident Office, processed it as evidence, securing the exhibit in the Memphis Resident Drug vault until sending the exhibit to the NSRL.

2. Pursuant to the execution of a Federal Search Warrant at 8288 George Brett, Cordova, Tennessee the residence of Jae LEE on January 7, 2009, TFO's Brunson and Stauffer seized Exhibit 21 is eighty-eight (80) blue tablets (Ecstasy) recovered from a plastic bag found in the book case in the dining room area of the residence. TFO's Brunson and Stauffer maintained custody of the exhibit, transporting it to the Memphis Resident Office, processed it as evidence, securing the exhibit in the Memphis Resident Drug vault until sending the exhibit to the NSRL.

3. Pursuant to the execution of a Federal Search Warrant at 8288 George Brett, Cordova, Tennessee the residence of Jae LEE on January 7, 2009, TFO's Brunson and Stauffer seized Exhibit 22 is a plastic bag containing three (3) unknown tablets which was recovered from a box hidden underneath the bed in the master bedroom. TFO's Brunson and Stauffer maintained custody of the exhibit, transporting it to the Memphis Resident Office, processed it as evidence, securing the exhibit in the Memphis Resident Drug vault until sending the exhibit to the NSRL.

4. Pursuant to the execution of a Federal Search Warrant at 8288 George Brett, Cordova, Tennessee the residence of Jae LEE on January 7, 2009,

TFO's Brunson and Stauffer seized Exhibit N-50 ($32,432.00 U. S. Currency) recovered from a blue bag next to the couch in the living room. The U.S. currency received a positive alert by K-9 "RIP". The U.S. Currency remained in TFO's Brunson and Stauffer custody, until being transported to the Memphis RO and relinquished into the custody of the HVSRM custodian, via DEA-12. An appointment was setup with the First Tennessee Bank Vault for an official money count to occur on January 9, 2009 at 08:30am. TFO'S Price and Freeman took Exhibit N-50 out of the HVSRMC, via DEA-12, and took the exhibit to the First Tennessee Bank Vault and had the U.S. Currency converted into a First Tennessee Bank cashier's check in the amount of $32,432.00 dollars, pay to the order of the U.S. Marshal's.

5. Exhibit N-50a is a SSEE money bag which exhibit N-50 was placed into by TFO's Brunson and Stauffer. Exhibit N-50a was processed as evidence by TFO's Brunson and Stauffer and later released to the MRO NDEC.

6. Exhibit N-50b is a photograph the exhibit N-50 by TFO's Brunson and Stauffer. Exhibit N-50b was processed as evidence by TFO's Brunson and Stauffer and later released to the MRO NDEC.

7. Exhibit N-57 is a 2001 Nissan Maxima bearing Tennessee license number 406LPH, with VIN: JN1CA31D31T814241 which was seized from Jae LEE at the time of his arrest. The vehicle was towed to Bartlett Towing lot located at 1807 Bartlett Road, Memphis TN., for storage. Exhibit N-57 is pending Federal seizure procedures.

8. Pursuant to the execution of a Federal Search Warrant at 8288 George Brett, Cordova, Tennessee the residence of Jae LEE on January 7, 2009, TFO's Brunson and Stauffer seized Exhibit N-82 which is one (1) brown wallet containing misc., papers, records, and documents, set of keys that was recovered from LEE's pants pocket. TFO's Brunson and Stauffer maintained custody of the exhibit, transporting it to the Memphis Resident Office, processed it as evidence, securing the exhibit in the Memphis Resident Non-Drug vault.

9. Pursuant to the execution of a Federal Search Warrant at 8288 George Brett, Cordova, Tennessee the residence of Jae LEE on January 7, 2009, TFO's Brunson and Stauffer seized Exhibit N-83 which is a check book for the Mandarin Palace, Banking records for America in the name of Amy CHU, (account number [REDACTED]) misc., papers with names and numbers recovered from a blue bag in the living room. TFO's Brunson and Stauffer maintained custody of the exhibit, transporting it to the Memphis Resident Office, processed it as evidence, securing the exhibit in the Memphis Resident Non-Drug vault.

10. Pursuant to the execution of a Federal Search Warrant at 8288 George Brett, Cordova, Tennessee the residence of Jae LEE on January 7, 2009, TFO's Brunson and Stauffer seized Exhibit N-84 which is a brown brief case with misc., papers, records, documents and photographs pertaining to the Mandarin Palace, and a black note book with names and numbers which was acquired from the dinning room area of the residence. TFO's Brunson and Stauffer maintained custody

of the exhibit, transporting it to the Memphis Resident Office, processed it as evidence, securing the exhibit in the Memphis Resident Non-Drug vault.

INDEXING

1. LEE, Jae – [Redacted]
2. CHU, Amy Eva – [Redacted] Female Asian, DOB: [Redacted], SSN: [Redacted] POB: Memphis, TN, Address: 8288 George Brett Drive, Cordova, TN., Cellular telephone: [Redacted], Employer: Memphis Pathology Lab, Memphis, TN., BP: 901-405-82222, Passport NO: [Redacted] TNDL: [Redacted].
3. CHU, Alfred – [Redacted] Male Asian, address; 8922 Alana, Cordova, TN., registered owner of a 2001 Nissan Maxima bearing Tennessee license number 406LPH, with VIN: JN1CA31D31T814241, NFI.
4. CHEN, Fu Hua – [Redacted] Male Asian, address; 3204 RosLeight Dr., Southaven, MS, DOB: [Redacted], MSDL: [Redacted], Cp: [Redacted], registered owner of a 1991 Honda Prelude bearing Mississippi license number DDF134, with VIN: JHMBA4137MC027236, NFI.

U.S. Department of Justice
Drug Enforcement Administration

REPORT OF DRUG PROPERTY COLLECTED, PURCHASE, OR SEIZED

1. Date Prepared: 01-12-2009
2: Case #: [Redacted]
3. File Title: LUM, Gum
4. Program Code:
5. GDEP #: [Redacted]
6. Group No: MRO
7. Date Taken into DEA Custody: 01-07-2009
8. Where obtained (City, State/Country): Memphis, Tennessee, USA
9. Is this document for informational purposes only?
   ☐ No ☐ Yes
10. How obtained?
    ☐ Purchase cost per exhibit: (1)_____
    (2)_____ (3)_____
    ☐ Seized
    ☐ Money Flashed
    ☐ Compliance Sample (Non-Criminal)
    ☐ Free Sample
    ☐ Clandestine Laboratory Seizure
    ☐ Regulatory
    ☐ Internal Body Carry*
    ☐ Stockpile Reverse Undercover
    ☐ Other: _____

    * A biohazard warning label must be placed on the heat sealed evidence envelope containing the evidence acquired from an internal body carry.

11. If referral, name of referring agency:
    11a. Case #: 11b. Seizuire #:

12. If seized for forfeiture (pseudophedrine) and held as evidence or for safekeeping, was a SSF prepared?
☐ If yes, attach SSF and enter Asset ID (formerly CATS ID) # _____
Provide asset (fair market) value at time of seizure: _____
☐ If no, explain: _____

13. Exhibit #	14. FDIN #	15. Alleged Drugs
Ex. 20		Ecstasy
Ex. 21		Ecstasy
Ex. 22		unknown

16. Describe Marks on labels (Note: if original container is separate from drug, enter subexhibit # and describe original container fully.)

[Ex. 20]	1 HSEE containing 8 blue tablets.
[Ex. 21]	1 HSEE containing a plastic bag with 80 tablets blue in color.
[Ex. 22]	1 HSEE cointaining a plastic bag with 3 orange tablets.

	Approx. Gross Quantity		
	17. Seized	18. Submitted	19. Retained
[Ex. 20]	26.2 gg	26.2gg	
[Ex. 21]	48.8gg	48.8gg	
[Ex. 22]	27.5gg	27.5gg	

20. Is this a bulk drug seizure?
☐ No ☐ Yes (If yes, provide date of 60-day letter: _____)

21. Identify:
☐ N/A ☐ Threshold DEA-7 or ☐ Bulk DEA-7

22. ☐ Fingerprint Analysis Requested for exhibit(s):

22a. Compare Latent Prints with subject(s):

Name	FBI and or State ID Number(s)	Date of Birth

Identify type of prints attached

Finger	Palm	None

23. REMARKS:
On 01-07-09, a federal search warrant was executed at 8288 George Brett, Cordova, TN. Ex. 20, described above, was recovered from a empty box of cigarettes located on a book case in the dinning room area by TFO D. Brunson. Ex. 21, described above was also recovered from the book case by TFO Brunson. Ex. 22, described above was recovered from a box concealed under the bed in the master bedroom by TFO Brunson. TFO Brunson maintained custody of all the exhibits, transporting them to the MRO, processing them as evidence, and storing the exhibits in the MRO drug vault until sending them to the NSRL for analysis.

24. Type/Print Name of Special Agent/Task Force Officer/Diversion Investigator:
TFO Dennis Brunson 01-12-2009

24a. Signature and Date:

25. Type/Print Name of Supervisor:
RAC Keith Brown 01-12-2009

25a. Signature and Date:

DRUG EVIDENCE CUSTODIAN RECEIPT REPORT (FOR FIELD OFFICE USE ONLY)

26. No. Packages:
27. Print/Type Name Received From:
27a. Signature and Date:
28. SEAL ☐ Broken ☐ Unbroken
29. Print/Type Name Received By:
29a. Signature and Date:
30. Date Entered Into ENEDS/CERTS:

LABORATORY EVIDENCE RECEIPT REPORT (FOR LABORATORY USE ONLY)

31. No Packages:
32. Print/Type Name Received From:
32a. Signature and Date:
33. SEAL ☐ Broken ☐ Unbroken
34. Print/Type Name Received By:
34a. Signature and Date:
35. Laboratory #s:
    (1)_____ (2)_____(3)_____
36. Laboratory Control #s:
    (1)_____ (2)_____(3)_____

DEA Form 7 (08/07) (Previous editions are obsolete)
Copy 1 - Prosecutor

(UNREDACTED)

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION

UNITED STATES OF AMERICA,	)	
Plaintiff,	)	
VS.	)	NO. 09-20011
JAE LEE,	)	
a/k/a "Jae L. Williams",	)	
Defendant.	)	

CHANGE OF PLEA HEARING PROCEEDINGS

BEFORE THE HONORABLE BERNICE B. DONALD, JUDGE

WEDNESDAY MORNING

JUNE 17, 2009

LYNN DUDLEY
OFFICIAL REPORTER
950 FEDERAL BUILDING
MEMPHIS, TENNESSEE 38103

[2] APPEARANCES

Appearing on behalf of the Plaintiff:

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MEMPHIS, TENNESSEE 38103
BY: ARUN G. RAO, ESQ.
ASSISTANT U. S. ATTORNEY

Appearing on behalf of the Defendant:

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SUITE 901
MEMPHIS, TENNESSEE 38103
(901)522-8829
BY: LARRY E. FITZGERALD, ESQ.
ATTORNEY AT LAW

[3] WITNESS INDEX

WITNESS	PAGE	LINE
JAE LEE		
DIRECT EXAMINATION		
BY THE COURT	7	6

[4] EXHIBIT INDEX

EXHIBIT NUMBER	PAGE	LINE
NO EXHIBITS		

[5] **WEDNESDAY MORNING**

JUNE 17, 2009

The change of plea hearing in this case began on this date, Wednesday, June 17, 2009, at 10:30 o'clock a.m., when and where evidence was introduced and proceedings were had as follows:

THE COURT: On the calendar is the matter of United States of America versus Jae Lee, also known as Jae L. Williams.

This matter is set for a change of plea in Case Number 09-20011.

Mr. Rao is here for the United States, and Mr. Fitzgerald is here for the defendant, and the defendant is present.

Are the parties prepared to proceed?

MR. FITZGERALD: Yes, Your Honor.

MR. RAO: Yes.

THE COURT: Mr. Lee, raise your right hand and be sworn, sir.

THE CLERK: Do you solemnly swear or affirm, under the penalties of perjury, the testimony that you are about to provide the court [6] in this matter will be the truth, the whole truth and nothing but the truth, so help you God?

THE WITNESS: I do.

[7] **JAE LEE,**

was thereupon called as a witness on behalf of the Court, and having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY THE COURT:

Q. Mr. Lee, would you state your name for the record.

A. Jae Lee.

Q. And, Mr. Lee, have you been known by any other name?

A. Jae L. Williams.

Q. Your true name is Jae Lee?

A. Yes, ma'am.

Q. Mr. Lee, what is your age and your level of education?

A. I'm 40 years old.

Q. Okay.

A. And high school.

Q. Okay. Have you ever been treated by any doctor, psychologist or psychiatrist for any mental or addictive condition?

A. No, Your Honor.

Q. You are represented by attorney Larry Fitzgerald, are you satisfied with Mr. Fitzgerald's [8] representation?

A. I'm sorry.

Q. Are you satisfied with your lawyer's representation?

A. Oh, yes, Your Honor.

Q. Has he advised you about the charges, discussed your options with you and kept in contact with you about the case?

A. Yes, Your Honor.

Q. Okay. You are hear today charged in a one count indictment which reads as follows:

On or about January 7, 2009, in the Western District of Tennessee the defendant Jae Lee, also known as Jae Williams, did unlawfully, knowingly and intentionally possess with the intent to distribute a mixture and substance containing a detectable amount of controlled 3,4-methyl-something or other, known as ecstasy --

MR. RAO: MDMA the court can use as well.

BY THE COURT:

Q. Okay. That is a long word.

In violation of Title 21, United States Code, Section 841(a)(1).

A conviction of that offense carries a maximum [9] penalty of 20 years, plus a maximum fine of one million dollars, plus three years supervised release or, after a prior drug felony conviction, not more than 30 years, plus a $2,000,000 fine maximum, plus six years of supervised release, together with a mandatory special assessment of $100.

Are you aware that that that's what you are charged with and that those are the statutory maximum penalties?

A. Yes, Your Honor.

Q. Okay. This is a felony offense, and if you are convicted of this felony offense, Mr. Lee, whether it's by trial or by plea, it could have certain negative affects on your civil rights, you could lose the right to vote, the right to possess and carry a firearm, the right to serve on a jury, and the right to stand for certain public offices.

Knowing that those important rights and/or benefits could be affected, are you still wishing to go forward and plead guilty?

A. Yes, Your Honor.

Q. And are you a U. S. citizen?

A. No, Your Honor.

Q. Okay. A conviction on this charge then could result in your being deported. It could also affect [10] your ability to attain the status of a United States citizen. If you do become a United States citizen, it could affect your rights to participate in certain federal benefits, such as student loans.

Does that at all affect your decision about whether you want to plead guilty or not?

A. Yes, Your Honor.

Q. Okay. How does it affect your decision?

A. I don't understand.

Q. Okay. Well, knowing those things do you still want to go forward and plead guilty?

A. Yes, Your Honor.

Q. Okay. There's been a plea agreement tendered. I'm going to ask you to listen as Mr. Rao summarizes the terms of the plea agreement.

And let me remind you, Mr. Lee, that at anytime during this process, if you have a question, please feel free to raise it. If you need to speak privately with your lawyer, let me know and I will let you step back and speak privately with him. Okay.

A. Yes, ma'am.

Q. Now listen to Mr. Rao as he explains the terms of the plea agreement?

MR. RAO: Thank you, Your Honor.

In summary, the plea agreement [11] provides that the defendant has agreed with the United States to plead guilty to Count One of the indictment, which charges, as Your Honor has noted, a violation of 21 United States Code Section 841(a)(1).

Pursuant to Rule 11(c)(1)(B) of the Federal Rules of Criminal Procedure, and in consideration for his plea of guilty there is going to a joint recommendation between the government and the defendant that the defendant receive the full three-level reduction for acceptance of responsibility. The defendant understands this is only a recommendation and that if the court does not accept that recommendation, the defendant would nevertheless not have the right to withdraw his plea.

In addition, the government will not object to a finding, if the defendant qualifies under the safety valve provisions of 18 U.S.C. 3553(f) and U. S. Sentencing Guideline 5C1.2 provided that the defendant

complies with the requirement for that reduction, including that he have no more than one criminal history point, and that no later than the time of sentencing he has, in the government's view, truthfully provided to [12] us all information and evidence he has concerning the offenses charged in the indictment in this case.

There are no other promises or representations. The defendant is to understand that the court is going to take the accurate sentencing guidelines range into account before imposing a sentence, but the defendant should also understand that the court is not bound by the sentencing guidelines and can impose any sentence within statutory limits.

If it is determined by the government that the defendant has committed or attempts -- has attempted to commit any additional crimes or has engaged in any conduct constituting obstructing justice or impeding justice or fails to make any court appearances in this case from the date of the signing of the plea agreement, that is today, to the date of his sentencing or if the defendant attempts to withdraw his plea, then the government will be released from its obligations and will be free to argue for any sentence within the statutory limits.

That breach, however, would not release you, the defendant, from your plea of [13] guilty.

There is a special assessment that is due and payable.

And the writing I've just gone over, which consist of three pages, contains the entire agreement with respect to your guilty plea, there are no other understandings or agreements.

BY THE COURT:

Q. Mr. Lee, you heard the terms of the plea agreement as summarized on the record by Mr. Rao. In listening to him, is that what you understood your agreement to be with the government.

A. Yes, Your Honor.

Q. Has anyone promised you anything other than what's contained in this written plea agreement?

A. No, Your Honor.

Q. Did you read the plea agreement for yourself?

A. Yes, Your Honor.

Q. And did you discuss it with your attorney Mr. Fitzgerald?

A. Yes, Your Honor.

Q. If you had questions, did he answer those questions for you?

A. Yes, Your Honor.

Q. And after reading the plea agreement and [14] discussing it with your lawyer and considering all of your options, did you sign the plea agreement of your own free will?

A. Yes, Your Honor.

Q. Did anyone exert any threats or pressure against you to cause you to sign the plea agreement?

A. No, Your Honor.

Q. Okay.

THE COURT: Then I shall accept the plea agreement and file it of record with the clerk of court.

BY THE COURT:

Q. Mr. Lee, you have an absolute right to plead not guilty and have your case tried before a jury on your not guilty. If you were to plead not guilty and demand a trial, we would bring in a pool of people from which a 12-person jury would be impaneled to hear proof in this case. You would have the right to have your attorney represent you at every stage of the process. The burden will be on the government to prove you guilty of this charge by proof beyond a reasonable doubt as to each and every element of the offense.

You could not be called to the witness stand against your will to testify. You could not be [15] required to present proof. If you chose not to testify or not to present proof, I would tell the jury that they could not hold that against you, that they couldn't even consider it in the process of their deliberations.

Now, if you wanted to have witnesses subpoenaed, you would have the right to have compulsory subpoenas issued to compel your witnesses to come in and testify even though they may not volunteer to do so.

And if I didn't say it already, your attorney would have an opportunity to vigorously cross examine each and every witness brought by the government to prove the government's case.

If you plead guilty today, you are giving up those trial rights. There will not be a trial. You will be

adjudged guilty based upon your admission of guilt if you choose to go forward and plead guilty.

Do you understand that?

A. Yes, Your Honor.

Q. Do you still want to do forward with the guilty plea?

A. Yes, Your Honor.

Q. Okay. Did Mr. Fitzgerald explain to you that in the federal system there is no parole. That I will [16] be the sentence judge, and once I accept your plea, there will be no right for you to withdraw that plea.

Do you understand those things?

A. Yes, Your Honor.

Q. In the process of sentencing I will use as one factor in the sentencing process the United States Sentencing Guidelines, which are advisory in nature, but in addition to these guidelines, I will also consider information that Mr. Fitzgerald will present on your behalf that might impact or help the court in determining what an appropriate sentence might be.

Do you understand that?

A. Yes, Your Honor.

Q. Any questions?

A. No, Your Honor.

Q. Okay. Please listen now as Mr. Rao explains what the government's proof would have been had this matter proceeded to trial.

MR. RAO: Thank you, Your Honor.

Had this matter proceeded to trial the government would have established that on January 7, 2009, members of law enforcement executed a federal search warrant inside of 8288 George Britt Drive in Cordova, Tennessee here in the Western District of Tennessee, that is the [17] defendant's residence.

Inside of that residence they found in the living room area $32,432. And in the dining area eight MDMA tablets in a cigarette box on the bookcase. And 88 additional MDMA tablets in a plastic bag on the bookcase.

Those tablets were field tested and tested positive for the presence of MDMA.

According to members of law enforcement, in their training and experience, the amount of MDMA recovered was consistent with distribution rather than personal use.

The defendant was arrested in the residence and spoke with law enforcement and admitted that the MDMA tablets belonged to him.

The proof at trial would have consisted of, among other things, testimony from law enforcement regarding the events that occurred and testimony about laboratory tests on the drugs.

BY THE COURT:

Q. Mr. Lee, you've heard the statement of Mr. Rao about what the government's proof would have been had this matter gone to trial, as it relates to your actions is Mr. Rao's statement true?

A. Yes, Your Honor.

[18] **THE COURT**: Then I find that a factual basis does exist for your plea.

BY THE COURT:

Q. Has anyone made any threats against you or your family to cause you to plead guilty?

A. No, Your Honor.

Q. Are you pleading guilty in an effort to try and coverup or protect someone else?

A. No, Your Honor.

Q. Are you pleading guilty out of a sense of fear, duress or coercion?

A. Oh, no, Your Honor.

Q. Then you are pleading guilty because you are, in fact, guilty of this offense?

A. Yes, Your Honor.

Q. Okay. Do you have any questions at this time?

A. No, Your Honor.

Q. Do you need to speak privately with Mr. Fitzgerald before I formally take your plea?

A. No, Your Honor.

THE COURT: Mr. Fitzgerald, is there anything else that you would have me ask your client before I formally take his plea?

MR. FITZGERALD: No, Your Honor.

THE COURT: Mr. Rao, from the United [19] States?

MR. RAO: Nothing from the government, Your Honor.

BY THE COURT:

Q. Okay. Then, Mr. Ree -- Mr. Lee -- pardon me -- I would ask you at this time, how do you plead to the charge of possessing with the intent to distribute an amount of controlled substance, and in the indictment it shows 3 comma 4 methylenedioxmethaphetamine.

THE COURT: What's the three comma four?

MR. RAO: That's the term that's used to refer to the methamphetamine, it's the prefix that I saw that is typically used to describe that substance. I don't know if there is a scientific reason for, it's not an amount.

THE COURT: Okay.

MR. RAO: It's a -- it's a reference to the --

THE COURT: Okay.

MR. RAO: -- to the substance itself.

THE COURT: Okay. So three comma four. Okay.

MR. RAO: I wish I was more familiar, Your Honor, but I believe it's -- it's -- it's [20] just part of the technical reference for the substance itself.

THE COURT: Okay.

BY THE COURT:

Q. Well, I have -- I have broken it down and I have now identified, methylenedioxmethaphetamine.

Okay. So how do you plead to this, sir?

A. Guilty.

MR. RAO: Just pointing out on that -- on that topic that Your Honor just raised, I was just flipping through the sentencing guidelines, when they're talking about different items, they describe it as three comma methylene --

THE COURT: Dioxymethamphetamine, yes.

MR. RAO: Yes.

THE COURT: Okay.

MR. RAO: So I think that's just a technical reference.

THE COURT: Thank you.

Okay. Mr. Lee --

THE WITNESS: Yes.

THE COURT: -- based upon your admission of guilt and based upon your answers to my questions during this plea colloquy I find that you satisfied all of the requirements for [21] tendering a knowing, counseled, informed and voluntary plea. I shall accept your plea and change it on the record from not guilty to guilty and will set a date for sentencing.

What is that date, Ms. Elchlepp?

THE CLERK: Thursday, September 17th at 1:30 p.m.

THE COURT: September 17th at 1:45 p.m. that will be the sentencing date, Thursday, September 17th at 1:45 p.m.

You will need to speak to the probation officer about your background and about that offense. Make certain that you answers their questions truthfully and completely.

Whatever you do, do not withhold information and do not give false information as that can only hurt you.

A report is going to be prepared for the court containing a lot of that information. And if there is anything in the report that you believe to be inaccurate or that you wish to contest, you will have an opportunity to do that at the sentencing hearing, sir.

Remember that you do have the right to have your lawyer accompany you to that probation [22] interview.

So, if you want Mr. Fitzgerald to accompany you, please let him know so that he may arrange his calendar accordingly.

BY THE COURT:

Q. Are there any questions?

A. No, Your Honor.

THE COURT: Then these parties are excused and thank you.

MR. RAO: Thank you, Your Honor.

THE COURT: Thank you.

(Adjournment at 10:52 a.m.)

[23] **CERTIFICATE**

I, Lynn Dudley, do hereby certify that the foregoing 22 pages are, to the best of my knowledge, skill and ability, a true and accurate transcript from my stenotype notes of the change of plea hearing on June 17, 2009, in the matter of:

United States of America

vs.

JAE LEE

Dated this 21st day of July 2010.

Lynn Dudley
Official Court Reporter
United States District Court
Western District of Tennessee

(UNREDACTED)

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION

UNITED STATES OF AMERICA,	)	
Plaintiff,	)	
VS.	)	NO. 09-20011
JAE LEE,	)	
a/k/a, "Jae L. Williams",	)	
Defendant.	)	

SENTENCING HEARING PROCEEDINGS

BEFORE THE HONORABLE BERNICE B. DONALD, JUDGE

MONDAY MORNING

SEPTEMBER 28, 2009

LYNN DUDLEY
OFFICIAL REPORTER
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BY: ARUN G. RAO, ESQ.
ASSISTANT U. S. ATTORNEY

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(901)522-8829
BY: LARRY E. FITZGERALD, ESQ.
ATTORNEY AT LAW

[3] WITNESS INDEX

WITNESS	PAGE	LINE
JAE LEE		
DIRECT EXAMINATION		
BY THE COURT	7	6

[4] EXHIBIT INDEX

EXHIBIT NUMBER	PAGE	LINE
NO EXHIBITS		

[5] **MONDAY MORNING**

SEPTEMBER 28, 2009

The sentencing hearing in this case began on this date, Monday, September 28, 2009, at 10:15 o'clock a.m., when and where evidence was introduced and proceedings were had as follows:

THE COURT: On the calendar is the matter of United States of America versus Jae Lee, Case Number 09-20011.

This matter is set for sentencing.

Mr. Rao is here for the United States, Mr. Fitzgerald and Mr. Lee.

Are the parties prepared to go forward at this time?

MR. RAO: Yes, Your Honor.

MR. FITZGERALD: Yes, Your Honor.

THE COURT: Mr. Lee, raise your right hand and be sworn.

THE CLERK: Do you solemnly swear or affirm, under the penalties of perjury, the testimony that you are about to provide the court in this matter will be the truth, the whole truth [6] and nothing but the truth, so help you God?

THE WITNESS: Yes.

[7] **JAE LEE,**

was thereupon called as a witness on behalf of the Plaintiff, and having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY THE COURT:

Q. Mr. Lee, would you state your name for the record, please.

A. Jae Lee.

Q. In the last 24 hours have you consumed any drugs, alcohol or prescription medication?

A. No, ma'am.

Q. You are represented by attorney Larry Fitzgerald, are you satisfied with his representation?

A. Yes.

Q. You are here today having been convicted of possession with the intent to distribution MDMA or ecstasy in violation of Title 21, United States Code, Section 841(a)(1), a Class C felony, that carries not more than 20 years imprisonment, a fine of not more than a million dollars, not less than three years supervised release and a one hundred dollar assessment.

Are you aware that those are the penalties for this offense?

[8] **A.** Yes, Your Honor.

Q. A Presentence Report has been prepared in your case based on the advisory United States Sentencing Guidelines.

Have you had an opportunity to review and discuss the report with your counsel?

A. Yes, Your Honor.

Q. In reviewing and discussing the report, if you hadquestions, did he answer those questions for you

A. Yes, Your Honor.

Q. Okay. I'm going to go over the calculations contained in the report beginning on page Worksheet A.

You start with a base level offense of 18 under Guideline 2D1.1(c)(11) for this ecstasy offense.

There's a two point enhancement because a firearm was involved, that's governed by Guideline 2D1.1(b)(1), that takes you to a base offense level of 20.

You have no prior criminal history.

The government is making --

THE COURT: Is the government making the motion for the extra point?

MR. RAO: Yes, Your Honor.

THE COURT: That being granted.

You have a three level reduction for [9] acceptance of responsibility.

That reduces your offense level to 17.

You have a Criminal History Category of I. That yields an advisory guideline range of 24 to 30 months.

You are in Zone D of the advisory sentencing guidelines.

The fine range is five thousand to $50,000 with a one million dollar cap.

There is a one hundred dollar special assessment for this one felony conviction.

Those are the calculations.

BY THE COURT:

Q. Are there any questions about those calculations?

A. No, Your Honor.

THE COURT: The government has filed a position paper indicating that there are no objections to the report.

Mr. Fitzgerald, are there any objections.

MR. FITZGERALD: There's no objections, Your Honor.

THE COURT: The court will adopt the Presentence Report as its findings and move to the [10] sentencing phase.

I'm ready to hear from you unless there are motions in this case.

MR. RAO: No motions in this case.

THE COURT: I'm ready to hear from you, Mr. Fitzgerald.

MR. FITZGERALD: Yes, Your Honor.

Your Honor, mr. Lee up to this point, Your Honor, had been an exemplary citizen of the United States. He has been here since he was 12 years old, currently came her with a language barrier, has done very well for himself, opened up -- came to Memphis,

Tennessee some years ago and had opened up two restaurants, been doing quite well for himself except for this, I guess, what I call one glitch, one glitch, Your Honor.

He knows that it was wrong. He said he was basically, he was using ecstasy as well as selling it, Your Honor, and that's -- that probably was problem and which led to his situation, Your Honor.

But for, Your Honor, the -- the gun he would qualify for the safety valve, Your Honor, the gun was -- the law does not require that he use the gun in -- in furtherance of the crimes [11] that he committed and that he was not, I don't think there is any indication that he was, but the gun was present. And but for that gun, Your Honor, he would qualify for the safety valve, Your Honor.

Your Honor, we realize that Mr. Lee has done everything that he is supposed to do and even since he has been on this -- ever since he has been under pretrial service, Your Honor, he has no prior drug tests. He has basically done everything that he is supposed to.

What we are looking at a person who had maybe a one time -- not a one -- I'm not saying that he sold one time, Your Honor, that's not what I'm saying, Your Honor, at all, but I'm saying a one time -- let me see the way I want to describe it -- problem, Your Honor, and it led to being here.

Your Honor, I think in -- in light of the sentencing guidelines, Your Honor, I think that Mr. Lee should be put on probation since the guidelines are advisory, Your Honor. This is a situation where a man who has no -- no criminal record, none, Your

Honor, other than this one -- one offense, Your Honor.

[12] And I know it's a serious offense and I'm -- I'm not taking it lightly, Your Honor.

At best, Your Honor, I would -- I would submit, Your Honor, that maybe he should be given a six months halfway house which looking at some form of deterrent or something of that nature, Your Honor.

THE COURT: But the report says that he has been engaged in drug trafficking for ten years and that he was not caught until now. So I understand your -- your -- your one time, but I think you mean, what you are talking about is this is his first -- first offense for, you know, under the law, but the activity has been ongoing, according to the report, for a number of years.

MR. FITZGERALD: Well, Your Honor, we're talking about 300 tablets, Your Honor, that -- that's 300 tablets of ecstasy, Your Honor, I mean, that's not -- I guess, even if you took it over a ten year period, what are we talking about, 30 pills a year. I'm saying that it is serious and maybe over a period of time, but I'm saying it's not a lot, that's all I'm saying, Your Honor.

THE COURT: Okay.

MR. FITZGERALD: And I'm saying that [13] perhaps probably he was using as many as he was selling. It's one of those kind of cases when you get involved in drugs and you start using them, you start doing whatever it takes.

Although he was -- he was making a living, when you look at his financial condition, it is not one that

looks like he's in -- negative, Your Honor, he has a negative $12,000 as far as his assets and liabilities are concerned. So he has been making a living but he hasn't been able to just -- he's not rich, Your Honor, and not wealthy in any sense of the word, Your Honor.

And as I say, Your Honor, I think if we're looking at deterrence here in this case, Your Honor, and looking at the sentencing guidelines perhaps he should be sentenced to six months in a halfway house, Your Honor.

THE COURT: Mr. Rao.

MR. RAO: Thank you, Your Honor.

I think Mr. Fitzgerald has cleared it up with the court, I had some concerns with the way he was phrasing initially the one glitch. Because as the court pointed out, this has been an ongoing -- ongoing case of narcotics dealing since January of 2001, it's undisputed in the report.

[14] There were 200 ecstasy pills purchased by -- from the defendant by a confidential informant between January of 2001 and December of 2008.

There was a purchase of 15 pills in December of 2008.

And then the search warrant itself where a total of 88 ecstasy pills were recovered at that time alone.

So it's a serious offense and it's been ongoing for quite sometime.

That being said, there are some factors in the defendant's favor that I want to bring to the court's attention.

The criminal history is nonexistent, which is a very good thing for Mr. Lee.

And he has been the owner of this restaurant in Bartlett, Mandarin Palace, since 1991 and appears to have some talent in that area and is, by all accounts, in that area performing very well.

So those factors do -- do weigh in favor of Mr. Lee.

All things considered the government is recommending a low end guideline sentence in [15] the case. And I have nothing further.

BY THE COURT:

Q. Mr. Lee, is there you want to say, you don't have to make a statement but if there is anything you want to say I'm prepared to hear from you at this time.

A. Yes, Your Honor.

First, I would like to say I'm very sorry. I made a bad judgment. I made a big mistake in my life, and, please, I need a second chance so I can continue with my restaurant which I love to do.

Thank you.

Q. Okay.

THE COURT: Mr. Lee, thank you for your statement.

As you and your attorney and the government has all recognized, this is a very zero serious offense, and it's one that has been ongoing for some period of time. It was not simply one aberrant act, but apparently one time getting caught.

And while we, you know, the number of pills that we are looking at is just under 300. There is nothing to suggest that that's the universe of pills that were involved in this ten [16] year period.

And I think that it would be fool hardy to believe that the ten year term included only the three hundred.

But in any event you have no prior criminal history. You have been gainfully employed in an entrepreneurial capacity with your restaurant.

It appears that you were suffering from drug addiction.

There was a weapon involved, but you have no violent history in your report.

It appears that you would not be a substantial danger to the community if you were sentenced to something other than the advisory guideline range.

The court has to look at a sentence that is sufficient but not greater than necessary to punish you and to protect the community.

Also to avoid unwarranted disparities in the sentencing schemes.

I believe that to give a probationary sentence under the circumstances of this case would send a wrong message. But I don't believe that 24 months is necessary to get this [17] defendant's attention and to punish.

So the court is going to impose, Mr. Lee, a custody sentence of 12 months and a day.

The court is going to impose a period of three years of supervision.

And the court will impose a fine in this case of $5,000, along with a one hundred dollar special assessment.

The court is going to order you to participate in drug treatment and drug testing, to participate in DNA collection, and to avoid committing other crimes.

You must keep your address and telephone number of record with the clerk of court -- with the probation office, pardon me.

And you are not to possess any kind of weapon or any ammunition.

Remember that your rights to carry a weapon are restricted.

Your right to vote is restricted.

That is going to be the court's sentence. Now this 12 months plus one day sentence will allow you to serve a minimum amount of time and you should be able to keep your [18] restaurant going.

Are there any questions about the sentence?

MR. FITZGERALD: No, Your Honor.

THE COURT: Did the defendant waive his right to appeal?

MR. FITZGERALD: We're going to, Your Honor, yes.

THE COURT: Okay. Mr. Lee, you have the right to appeal the court's sentence. If you desire to appeal, you will need to file the notice of appeal within ten days.

Let your attorney know if you wish to appeal and he will assist you in perfecting that appeal.

Any questions?

MR. FITZGERALD: No, Your Honor.

THE COURT: Are there any other counts?

MR. RAO: If I could have one moment.

MR. FITZGERALD: Mr. Lee would like to serve his time somewhere close, his home is here in Memphis.

THE COURT: Given this defendant's record, the court will recommend that he be [19] allowed to serve his time at the Millington camp.

MR. RAO: This is a single count indictment, Your Honor.

THE COURT: And the defendant will be allowed to self report.

MR. FITZGERALD: Thank you, Your Honor.

THE COURT: And, Mr. Fitzgerald, given that Mr. Lee has two major holidays coming up, are you asking that the sentence be deferred until after the first of the year --

MR. FITZGERALD: Yes, Your Honor.

THE COURT: -- to take advantage of the holiday traffic.

MR. FITZGERALD: Thank you, Your Honor.

THE COURT: Okay. The court will allow him to -- he will not be required to serve his sentence until after January of 2010.

MR. FITZGERALD: Thank you, Your Honor.

THE COURT: Thank you.

These parties are excused.

MR. JAE LEE: Thank you.

MR. RAO: Thank you, Your Honor.

[20](Adjournment at 10:38 a.m.)

[21] **CERTIFICATE**

I, Lynn Dudley, do hereby certify that the foregoing 20 pages are, to the best of my knowledge, skill and ability, a true and accurate transcript from my stenotype notes of the sentencing hearing in on September 28, 2009, in the matter of:

United States of America

vs.

JAE LEE

Dated this 21st day of July 2010.

Lynn Dudley
Official Court Reporter
United States District Court
Western District of Tennessee

Fitzgerald & Harris
An Association of Attorneys

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May 10, 2010

Re: USA v Jae Lee

To Whom It May Concern:

There was never any discussion of deportation during the negotiation of the Plea Agreement or during the Sentencing. It was my understanding that the Government was not seeking Deportation of Mr. Jae Lee.

Please feel free to contact me at my office if needed for further discussion concerning this matter.

Sincerely,

Larry E. Fitzgerald, Esquire

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION

JAE LEE, Movant, v. UNITED STATES OF AMERICA Respondent.	)	Case No.: _____ (2:09-CR-20011-D)

DECLARATION OF MOVANT JAE LEE

Movant, JAE LEE, respectfully files this Declaration in support of his separately filed Motion pursuant to 28 U.S.C. §2255. According LEE attests to the following:

1. I am the Movant in the above-referenced action and have personal knowledge concerning theses matters.

2. At the time of my arrest, as well as in discussions thereafter during the pretrial period, I did inform my attorney, Larry E. Fitgerald, that I was not yet a citizen of the United States, but a legal resident for more than thirty (30) years since my arrival in the United States from Korean as a child. I further advised Mr. Fitzgerald that I had never returned to Korea at any time, as well as that my parents were U.S. citizens, as was my girlfriend and fiancee.

3. During the pretrial proceedings, Mr. Fitzgerald made representations to me that the Government's wished to offer me a plea deal. Part of the express conditions I had was a limited amount of jail

time, if any, because my restaurant businesses would suffer while I was away. Additionally, I expressly sought Mr. Fitzgerald assurances that I would not be deported as a result. As to the likely sentence and consequences I should expect, Mr. Fitzgerald represented that in exchange for my guilty plea the Government had agreed to recommend I receive the maximum early acceptance reduction; that they would not object to the safety-valve; and that the Government would not seek my deportation. In fact, upon seeking his reassurances, Mr. Fitzgerald claimed that my 30+ years of living in the U.S. and strong ties, in combination with a lack of prior criminal history and the small amount of drugs involved, made it impossible for the Government to deport me even if they had wanted to.

4. While discussing the options of pleading or going to trial, Mr. Fitzgerald advised me that he agreed I likely could make out a strong entrapment case, or alternatively for simple possession instead of distribution, as well as that the unseen search warrant might be invalid once reviewed, but that there was always a risk of losing at trial. As per Mr. Fitzgerald, if I lost a trial I could face three to five years in prison, as well as cause the Government to decide to seek my deportation. Whereas, if I accepted a plea, I would get probation or house arrest, and *not* risk deportation. It was based only upon these assurances from Mr. Fitzgerald that I agreed to plead guilty and not pursue my right to jury trial. Also, when I inquired of Mr. Fitzgerald as to what the search warrant revealed, he claimed that the Government was not obligated to provide a copy of the search warrant or supporting affidavit while I was engaged in plea negotiations.

5. A few days before the plea change hearing, Mr. Fitzgerald reviewed the plea agreement with me and represented that it included everything that it was supposed to. When I again *expressly* sought reassurances that there was no risk of losing my legal alien status or being deported, Mr. Fitzgerald repeated that the Government was not in any way going to be seeking deportation. In this manner, Mr. Fitzgerald further claimed that if the Government had wanted to include deportation as part of the sentence, it would have had to been included within the Plea Agreement. Thus, as Mr. Fitzgerald explained, because the plea agreement was "binding," the non-inclusion of any deportation purportedly fully protected me. It was based only on the foregoing representations and advice that I agreed to sign the plea agreement.

6. On the morning of the plea change hearing, Mr. Fitzgerald advised me the Court was going to give a series of standard questions and warnings which the law required me to say I understood in order for my plea to be accepted, but that what really mattered most was what the plea agreement stated because that was binding. During the hearing, the Court advised me a "potential" consequence was deportation. When the Judge asked me if that would cause me not to plea, I said yes and that I didn't understand why she was saying that. At that point, Mr. Fitzgerald spoke quietly into my ear and advised me the Court was just giving a "standard warning" given to every non-U.S. Citizen. Mr. Fitzgerald then further reminded me that the Government had confirmed they were not going to seek my deportation, as well as that the "binding" plea agreement did not include that I would be deported. It was only after

Mr. Fitzgerald's re-assurances quiet consolations that I agreed to go forward with the plea.

7. A few days before sentencing, Mr. Fitzgerald provided the PSI to me for review and comment. My main concern was that safety-valve had not been given and the range of 24-30 months was certainly more than probation or house arrest. Additionally, I saw that the PSI was making untrue and inaccurate claims about a "CI" and his alleged dealings with me.

8. In response to my main concerns, Mr. Fitzgerald conceded that he had not realized I would be automatically disqualified for the safety-valve, but that the advisory nature of the Guidelines and judicial discretion made it very likely the Court would still give me a below-guideline sentence based on the insignificant nature of the case. Alternatively, Mr. Fitzgerald claimed that even if some incarceration time were issued, it would not be more than one-year, which I could then reduce through the drug program and half-way house. Mr. Fitzgerald also advised me that I would be able to serve my minimal time at a Prison Camp near my residence. These assurances were very important to me because I was still operating under the belief at that time that I would not lose my legal status or be deported. Consequently, the thrust of my concern was about how my restaurant businesses would be impacted during the period I would be away from them.

9. As to my concerns about the inaccurate and untrue claims in the PSI about the CI, I reported to Mr. Fitzgerald that the the CI had never paid the $150 debt in the manner the PSI claimed. Additionally, although the PSI didn't say either way, I clarified that the debt was not for Ecstasy, but

because the CI and I had previously agreed to split on an ounce of marijuana which the CI smoked, but never provided me the money to cover his share. As well, even when he claimed he was going chip in his own money to cover costs of buying drugs for partying, he would never follow-through and leave me or other friends with the costs. I also told Mr. Fitzgerald that it was completely untrue that the CI paid me the $150 debt at my residence, or that he saw me packaging any pills because, in truth, while the CI had told me he really needed some pills to party with a new girl he had met, I did not have any. I also told Mr. Fitzgerald that I explained to the CI that I was trying to cut down on doing Ecstasy and hadn't bought any pills for a while because it was an expensive habit and my restaurant businesses had slowed down a bit due to the economy. As well, I explained to Mr. Fitzgerald that the CI the left my house without paying the $150 debt, but instead he had only offered to do so as well as cover the cost" of the 15-20 pills he needed to party with if I could get them for him.

10. I also advised Mr. Fitzgerald that: (a) in the days that followed, the CI repeatedly telephoned me over thirty-six times in one week asking me to reconsider getting him some Ecstasy as a favor so he could party with his new girlfriend; (b) that I continually refused except that after he literally telephone-stalked me, I finally gave in and agreed to get him some Ecstasy pills so the he would stop stalking me; (c) that I told the CI he needed to cover the costs and pay for the marijuana ounce we had previously split; (d) that I then went and bought pills from my source Gum Lum (who was later arrested and prosecuted), but that as I usually did, had to buy one-hundred

(100) tablets in order to get the price of $20 per pill, rather than $30 per pill; and (e) that even though I planned to use the rest of the pills for partying with friends, I never used any of them personally, as well as didn't even give any away to anybody either because I was really trying to cut down on partying.

11. With respect to the inconsistencies with the alleged controlled buy incident reported in the PSI, I explained to Mr. Fitzgerald that when I contacted the CI to pick up the fifteen (15) pills he needed, the CI told me to come to his house and pick-up the money in his mailbox, but when I went there (with a witness), an envelope containing only the $150 for the marijuana debt was enclosed, along with a hand-written note which stated "this is all I have right now." After calling the CI, he apologized and advised that he would come by my house the next day with the $300 and pick up his pills. I also advised Mr. Fitzgerald that when the CI did come to pick-up the fifteen (15) pills and pay, I engaged in a discussion about the $150 being left in the mailbox instead of the $450, and that this was the type of B.S that caused me and other friends not to want to do any favors for him. In that same discussion, I also reiterated to the CI that I was really trying to cut-back on taking Ecstasy, and that this had been the first time in a very long time that I had even gone my source (Gum Lum) for pills. As such, I noted for Mr. Fitzgerald that because the PSI stated the CI had been outfitted with a recording device, he should should obtain the audio recordings because they would reveal the CI had lied about seeing me package pills, paying the $150 debt, having "bought" pills in the past eight (8) years, and that I had only got the pills as a favor for the CI because he persisted in

calling me more than three (3) dozen times and begging for his help so he could part with a new girlfriend he had met. In this regard, I further informed Mr. Fitzgerald that I had numerous witnesses for Fitzgerald who would testify that I would never sell drugs but give them away, as well as that the CI was a "mooch" and "free-rider."

12. In response, to my reports about the CI issues, Mr. Fitzgerald advised me that these things always popped up during the PSI process, but that spending time challenging the inconsistencies was unnecessary because the small amount of MDMA pills, with or without, the CI claims would not change the ultimate sentence. Thus, according to Mr. Fitzgerald, it would be better to focus our efforts and the Court's attention on my personal characteristics As well, Mr. Fitzgerald also advised that my concern about only eighty-five (85) pills being retrieved as opposed to eighty-eight (88) was also not worthy of challenging because it would not have impacted the advisory guideline range calculations.

13. At sentencing, I had no reason to believe that I was in risk of deportation because it was never mentioned. In fact, everyone seemed to focus on trying to help get a sentence low enough so that I could get back to my restaurants as quickly as possible. After sentencing, I made arrangements with a close friend to help manage my restaurant businesses for the six (6) to ten (10) months maximum I expected to be away from them based on Mr. Fitzgerald's representations. However, instead of Millington Prison Camp, the BOP designated me to CCA-Adams, Mississippi. Upon my arrival, I soon learned that CCA-Adams was a special contract

institution for the BOP which *exclusively* housed federal inmates which were to be deported upon completion of their sentences. Shortly thereafter, prison staff confirmed that INS was planning to visit me very soon to initiate deportation proceedings. Consequently, I immediately contacted Mr. Fitzgerald, but he said I was mistaken and that I was not going to be deported. Prison staff nevertheless re-confirmed that it was Mr. Fitzgerald who was mistaken because there was no question INS was seeking to deport me. After obtaining some advice in the prison law library, I advised Mr. Fitzgerald that I needed to get a letter from him confirming that the Government had agreed not to deport me, as well as that was the advice he had given him. As well, I also likewise advised that, in addition to the letter, I needed Mr. Fitzgerald to send me him a copy of my docket from P.A.C.E.R.; plea agreement; J&C; PSI; discovery; plea change hearing transcripts; and sentencing transcripts. As outlined in my §2255 Motion, although I ultimately received the requested materials, Mr. Fitzgerald needed significant prodding from me to actually follow-through. In fact, this is why it took me more than four (4) months to get what I needed. With respect to the letter for INS confirming I was not supposed to be deported, Mr. Fitzgerald wrote: "To Whom It May Concern: There was never any discussion of deportation during the negotiation of the Plea Agreement or during Sentencing. It was my understanding that the Government was not seeking Deportation of Mr. Jae Lee. Please feel free to contact me at my office if needed for further discussion concerning this matter."

14. Upon receiving all of the materials and Mr. Fitzgerald's letter for INS, I discovered case law in

the prison law library such as the Supreme Court's recent Padilla holdings, as well as statues, which revealed that Mr. Fitzgerald had affirmatively misadvised me that I would not be deported despite relevant immigration statutes were succinct and straightforward that the count I pleaded guilty to made my deportation a virtual certainty. I do verily state that had it not been for Mr. Fitzgerald misadvising me that I would not be deported if I agreed to plead guilty, then I would have without doubt proceeded to trial with all my evidence and witnesses. Consequently, this is why I am filing this §2255 Motion.

15. Lastly, after my arrest and arrival to prison, I have been advised that the CI had proved so unreliable, untruthful, and scandalous, that the Government risked damage to the prosecutions of numerous high-level drug traffickers they were trying to build a case upon, including Gum Lum, my source for buying pills. Upon information and belief, I believe that the reason I may have been arrested was to help prosecutors with their significant Gum Lum case as well as other cases. Specifically, I have been told that prosecutors were able to negotiate a plea agreement with Gum Lum through representing to he and his attorneys that I was pleading guilty and would be testifying against Gum Lum, even though I had not agreed to do so. In turn, Gum Lum's plea led to prosecutors ability to pressure and negotiate several other pleas, cooperation, and/or prosecutions with numerous even higher-level traffickers. Mr. Fitzgerald did not inform me of any of this.

I declare under penalty of perjury that the foregoing is true and correct.

September 20, 2010.

_____

Jae Lee

MOTION UNDER 28 U.S.C. § 2255 TO VACATE, SET ASIDE, OR CORRECT SENTENCE BY A PERSON IN FEDERAL CUSTODY

United States District Court
District Western District of Tennessee
Name (under which you were convicted): Jae Lee
Docket or Case No.: Cv. No. 10-2698-BBD
Place of Confinement:
Prisoner No.: 22715-076
UNITED STATES OF AMERICA v. Jae Lee
Movant (include name under which you were convicted)

MOTION

1. (a) Name and location of court that entered the judgment of conviction you are challenging: Western District of Tennessee, Western Division, 167 North Main Street, Memphis, TN, 38103

(b) Criminal docket or case number (if you know): 2:09-CR-20011-BBD

2. (a) Date of the judgment of conviction (if you know): September 29, 2009 (DE: 27, 30)

(b) Date of sentencing: September 28, 2009 (DE: 25)

3. Length of sentence: one year and one day

4. Nature of crime (all counts): charged only with one count of "Possession With Intent To Distribute MDMA" pursuant to 28 U.S.C. § 841(a)(1).

5. (a) What was your plea? (Check one)

(1) Not guilty ☐ (2) Guilty ☑

(3) Nolo contendere (no contest) ☐

(b) If you entered a guilty plea to one count or indictment, and a not guilty plea to another count or indictment, what did you plead guilty to and what

did you plead not guilty to? Charged with one count indictment only

6. If you went to trial, what kind of trial did you have? (Check one) Jury ☐ Judge only ☐

7. Did you testify at a pretrial hearing, trial, or post-trial hearing? Yes ☑ No ☐

8. Did you appeal from the judgment of conviction?
Yes ☐ No ☑

9. If you did appeal, answer the following:

(a) Name of court: N/A

(b) Docket or case number (if you know): _____

(c) Result: _____

(d) Date of result (if you know): _____

(e) Citation to the case (if you know): _____

(f) Grounds raised: _____

(g) Did you file a petition for certiorari in the United States Supreme Court? Yes ☐ No ☑

If "Yes," answer the following:

(1) Docket or case number (if you know): _____

(2) Result: _____

(3) Date of result (if you know): _____

(4) Citation to the case (if you know): _____

(5) Grounds raised: _____

10. Other than the direct appeals listed above, have you previously filed any other motions, petitions, or applications concerning the judgment of conviction in any court? Yes ☐ No ☑

11. If your answer to Question 10 was "Yes" give the following information:

(a) (1) Name of court: N/A

(2) Docket or case number (if you know): _____

(3) Date of filing (if you know): _____

(4) Nature of the proceeding: _____

(5) Grounds raised: _____

(6) Did you receive a hearing where evidence was given on your motion, petition, or application? Yes ☐ No ☑

(7) Result: _____

(8) Date of result (if you know): _____

(b) If you filed any second motion, petition, or application, give the same information:

(1) Name of court: N/A

(2) Docket or case number (if you know): _____

(3) Date of filing (if you know): _____

(4) Nature of the proceeding: _____

(5) Grounds raised: _____

(6) Did you receive a hearing where evidence was given on your motion, petition, or application? Yes ☐ No ☑

(7) Result: _____

(8) Date of result (if you know): _____

(c) Did you appeal to a federal appellate court having jurisdiction over the action taken on your motion, petition, or application?

(1) First petition: Yes ☐ No ☐

(2) Second petition: Yes ☐ No ☐

(d) If you did not appeal from the action on any motion, petition, or application, explain briefly why you did not: N/A

12. For this motion, state every ground on which you claim that you are being held in violation of the Constitution, laws, or treaties of the United States. Attach additional pages if you have more than four grounds. State the facts supporting each ground.

GROUND ONE: Ineffective Assistance Of Counsel (re: Deportation)

(a) Supporting facts (Do not argue or cite law. Just state the specific facts that support your claim.): Counsel not only failed to inform Movant that a col-

lateral consequence of pleading guilty would subject him to deportation, but actually affirmatively misadvised Movant that he would not be deported if he pleaded guilty.

See movant's separately filed "Motion Pursuant to 28 U.S.C. § 2255 . . ." and exhibits. (Cv. No. 10-2698-BBD at DE:1) for further details.

(b) **Direct Appeal of Ground One:**

(1) If you appealed from the judgment of conviction, did you raise this issue?

Yes ☐ No ☐ N/A

(2) If you did not raise this issue in your direct appeal, explain why: N/A No Appeal

(c) **Post-Conviction Proceedings:**

(1) Did you raise this issue in any post-conviction motion, petition, or application?

Yes ☐ No ☑

(2) If your answer to Question (c)(1) is "Yes," state:

Type of motion or petition: N/A

Name and location of the court where the motion or petition was filed: _____

Docket or case number (if you know): _____

Date of the court's decision: _____

Result (attach a copy of the court's opinion or order, if available): _____

(3) Did you receive a hearing on your motion, petition, or application?

Yes ☐ No ☐

(4) Did you appeal from the denial of your motion, petition, or application?

Yes ☐ No ☐

(5) If you answer to Question (c)(4) is "Yes," did you raise this issue in the appeal?

Yes ☐ No ☐

(6) If your answer to Question (c)(4) is "Yes," state:
Name and location of the court where the appeal was filed: _____
Docket or case number (if you know): _____
Date of the court's decision: _____
Result (attach a copy of the court's opinion or order, if available): _____
(7) If your answer to Question (c)(4) or Question (c)(5) is "No," explain why you did not appeal or raise this issue: _____

GROUND TWO: Ineffective Assistance of Counsel (re: Investigation)

(a) Supporting facts (Do not argue or cite law. Just state the specific facts that support your claim.): Counsel failed to conduct any pretrial investigation into possible defenses, evidence, witnesses, discovery or search warrant deficiencies, potential lesser offense options, and/or ensuring Movant received proper credit or consideration for the undisclosed benefits the Government received as a result of his plea. *See also, Movant's separately filed "Motion Pursuant to 28 U.S.C. § 2255 . . ." and exhibits (Cv. No. 10-2698-BBD at DE:1) for further details.

(b) **Direct Appeal of Ground Two**:

(1) If you appealed from the judgment of conviction, did you raise this issue?

Yes ☐ No ☐ N/A

(2) If you did not raise this issue in your direct appeal, explain why: N/A

(c) **Post-Conviction Proceedings:**

(1) Did you raise this issue in any post-conviction motion, petition, or application?

Yes ☐ No ☑

(2) If your answer to Question (c)(1) is "Yes," state:
Type of motion or petition: N/A
Name and location of the court where the motion or petition was filed: _____
Docket or case number (if you know): _____
Date of the court's decision: _____
Result (attach a copy of the court's opinion or order, if available): _____
(3) Did you receive a hearing on your motion, petition, or application?
Yes ☐ No ☐
(4) Did you appeal from the denial of your motion, petition, or application?
Yes ☐ No ☐
(5) If you answer to Question (c)(4) is "Yes," did you raise this issue in the appeal?
Yes ☐ No ☐
(6) If your answer to Question (c)(4) is "Yes," state:
Name and location of the court where the appeal was filed: _____
Docket or case number (if you know): _____
Date of the court's decision: _____
Result (attach a copy of the court's opinion or order, if available): _____
(7) If your answer to Question (c)(4) or Question (c)(5) is "No," explain why you did not appeal or raise this issue: _____

GROUND THREE: Ineffective Assistance of Counsel (re: Sentencing)

(a) Supporting facts (Do not argue or cite law. Just state the specific facts that support your claim.): Counsel confused the court at sentencing by misrepresenting Movant was a "citizen of the United

States," when he was not, and thus, deprived the court of the knowledge and consideration of a factor (the consequence of deportation) which is commonly relied upon as part of a court's sentencing discretion. *See also, Movant's separately filed "Motion Pursuant to 28 U.S.C. § 2255 . . ." and exhibits (Cv. No. 10-2698-BBD at DE:1) for further details.

(b) **Direct Appeal of Ground Three:**

(1) If you appealed from the judgment of conviction, did you raise this issue?

Yes ☐ No ☐ N/A

(2) If you did not raise this issue in your direct appeal, explain why: N/A

(c) **Post-Conviction Proceedings:**

(1) Did you raise this issue in any post-conviction motion, petition, or application?

Yes ☐ No ☑

(2) If your answer to Question (c)(1) is "Yes," state:

Type of motion or petition: N/A

Name and location of the court where the motion or petition was filed: _____

Docket or case number (if you know): _____

Date of the court's decision: _____

Result (attach a copy of the court's opinion or order, if available): _____

(3) Did you receive a hearing on your motion, petition, or application?

Yes ☐ No ☐

(4) Did you appeal from the denial of your motion, petition, or application?

Yes ☐ No ☐

(5) If you answer to Question (c)(4) is "Yes," did you raise this issue in the appeal?

Yes ☐ No ☐

(6) If your answer to Question (c)(4) is "Yes," state:

Name and location of the court where the appeal was filed: _____

Docket or case number (if you know): _____

Date of the court's decision: _____

Result (attach a copy of the court's opinion or order, if available): _____

(7) If your answer to Question (c)(4) or Question (c)(5) is "No," explain why you did not appeal or raise this issue: _____

GROUND FOUR: N/A

(a) Supporting facts (Do not argue or cite law. Just state the specific facts that support your claim.): ____

(b) **Direct Appeal of Ground FOUR:**

(1) If you appealed from the judgment of conviction, did you raise this issue?

Yes ☐ No ☐ N/A

(2) If you did not raise this issue in your direct appeal, explain why: N/A

(c) **Post-Conviction Proceedings:**

(1) Did you raise this issue in any post-conviction motion, petition, or application?

Yes ☐ No ☐

(2) If your answer to Question (c)(1) is "Yes," state:

Type of motion or petition: N/A

Name and location of the court where the motion or petition was filed: _____

Docket or case number (if you know): _____

Date of the court's decision: _____

Result (attach a copy of the court's opinion or order, if available): _____

(3) Did you receive a hearing on your motion, petition, or application?

Yes ☐ No ☐

(4) Did you appeal from the denial of your motion, petition, or application?

Yes ☐ No ☐

(5) If you answer to Question (c)(4) is "Yes," did you raise this issue in the appeal?

Yes ☐ No ☐

(6) If your answer to Question (c)(4) is "Yes," state:

Name and location of the court where the appeal was filed: _____

Docket or case number (if you know): _____

Date of the court's decision: _____

Result (attach a copy of the court's opinion or order, if available): _____

(7) If your answer to Question (c)(4) or Question (c)(5) is "No," explain why you did not appeal or raise this issue: _____

13. Is there any ground in this motion that you have not previously presented in some federal court? If so, which ground or grounds have not been presented, and state your reasons for not presenting them: Just the three grounds listed herein. They were not raised previously because claims of ineffective assistance of counsel cannot be raised until the § 2255 proceedings. _____

14. Do you have any motion, petition, or appeal now pending (filed and not decided yet) in any court for the judgment you are challenging? Yes ☐ No ☑

If "Yes," state the name and location of the court, the docket or case number, the type of proceeding, and the issues raised. N/A _____

15. Give the name and address, if known, of each attorney who represented you in the following stages of the judgment you are challenging:
(a) At preliminary hearing: Larry Fitzgerald, esq. 100 N. Main, Suite 901, Memphis, TN, 38103
(b) At arraignment and plea: Same attorney
(c) At trial: No trial / plea only
(d) At sentencing: Same attorney
(e) On appeal: No appeal taken
(f) In any post-conviction proceeding: N/A
(g) On appeal from any ruling against you in a post-conviction proceeding: N/A
16. Were you sentenced on more than one count of an indictment, or on more than one indictment, in the same court and at the same time? Yes ☐ No ☑
17. Do you have any future sentence to serve after you complete the sentence for the judgment that you are challenging? Yes ☐ No ☑
(a) If so, give name and location of court that imposed the other sentence you will serve in the future: N/A
(b) Give the date the other sentence was imposed: N/A
(c) Give the length of the other sentence: N/A
(d) Have you filed, or do you plan to file, any motion, petition, or application that challenges the judgment or sentence to be served in the future? Yes ☐ No ☑
18. TIMELINESS OF MOTION: If your judgment of conviction became final over one year ago, you must explain why the on-year statute of limitations as contained in 28 U.S.C. § 2255 does not bar your

motion.* This motion was filed within the one-year limit. See Cv. No. 10-2698-BBD (DE:1).

Therefore, movant asks that the Court grant the following relief:

To vacate his guilty plea, conviction, and sentence or any other relief to which movant may be entitled.

N/A

Signature of Attorney (if any)

I declare (or certify, verify, or state) under penalty of perjury that the foregoing is true and correct and that this Motion under 28 U.S.C. § 2255 was placed in the prison mailing system on Oct. 25. 2010 (month, date, year).

---

* The Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA") as contained in 28 U.S.C. § 2255, paragraph 6, provides in part that:

> A one-year period of limitation shall apply to a motion under this section. The limitation period shall run from the latest of —
>
> (1) the date on which the judgment of conviction became final;
>
> (2) the date on which the impediment to making a motion created by governmental action in violation of the Constitution or laws of the United States is removed, if the movant was prevented from making such a motion by such governmental action;
>
> (3) the date on which the right asserted was initially recognized by the Supreme Court, if that right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or
>
> (4) the date on which the facts supporting the claim or claims presented could have been discovered through the exercise of due diligence.

Executed (signed) on Oct 25, 2010 (date).
Note: Original 2255 (without this form filed Sept. 24, 2010 See Cv. No. 10-2698-BBD.

Signature of Movant

If the person signing is not movant, state relationship to movant and explain why movant is not signing this motion. N/A

(UNREDACTED)
IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION

JAE LEE,	)	
Petitioner,	)	
VS.	)	No. 10-2698
UNITED STATES OF AMERICA,	)	
Respondent.	)	

EVIDENTIARY HEARING
BEFORE THE
HONORABLE DIANE K. VESCOVO,
MAGISTRATE JUDGE
THURSDAY MORNING
FEBRUARY 9, 2012

LYNN DUDLEY
OFFICIAL REPORTER
923-A FEDERAL BUILDING
MEMPHIS, TENNESSEE 38103

[2] APPEARANCES

Appearing on behalf of the Petitioner:

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424 CHURCH STREET
SUITE 2260
NASHVILLE, TENNESSEE 37219
BY: PATRICK TIMOTHY MCNALLY, ESQ.
ATTORNEY AT LAW

Appearing on behalf of the Respondent:

EDWARD L. STANTON, ESQ.
UNITED STATES ATTORNEY
SUITE 800
167 NORTH MAIN STREET
MEMPHIS, TENNESSEE 38103
BY: KEVIN PATRICK WHITMORE, ESQ.
ASSISTANT U. S. ATTORNEY

[3] **WITNESS INDEX**

WITNESS	PAGE	LINE
JAE LEE		
DIRECT EXAMINATION		
BY MR. McNALLY	14	6
CROSS EXAMINATION		
BY MR. WHITMORE	43	7
REDIRECT EXAMINATION		
BY MR. McNALLY	78	12
LARRY FITZGERALD		
DIRECT EXAMINATION		
BY MR. WHITMORE	85	6
CROSS EXAMINATION		
BY MR. McNALLY	100	16
REDIRECT EXAMINATION		
BY MR. WHITMORE	115	6
RECROSS EXAMINATION		
BY MR. McNALLY	124	4

[4] **EXHIBIT INDEX**

EXHIBIT NUMBER	PAGE	LINE
Exhibit Number 1 Letter	34	18
Exhibit Number 2 Photographs	45	13
Exhibit Number 2 Photographs	46	15
Exhibit Number 3 Letter	54	16
Exhibit Number 4 Transcript	80	23
Exhibit Number 5 Report	95	18

[5] **THURSDAY MORNING**

FEBRUARY 9, 2012

The evidentiary hearing this case began on this date, Thursday, February 9, 2012, at 10 o'clock a.m., when and where evidence was introduced and proceedings were had as follows:

THE COURT: All right. Good morning.

We're here in the case of Jae Lee versus United States, docket -- docket number 10-2698.

We are set this morning for an evidentiary hearing on Mr. Lee's 2255 motion to vacate conviction and sentence.

And let me have counsel identify themselves for the record.

We'll start with Mr. Lee's counsel, Mr. McNally.

MR. McNALLY: Good morning, Your Honor, I'm Patrick McNally. I'm a member of the Nashville Bar Association, and also admitted in the Middle District and Western District of Tennessee Federal Courts.

THE COURT: Thank you, Mr. McNally, and [6] welcome to this court.

MR. McNALLY: Thank you.

MR. WHITMORE: Good morning, Your Honor. Kevin Whitmore for the United States.

THE COURT: Thank you, Mr. Whitmore.

I have read the petition, or the -- the motion and the response and the reply. I have not read through the -- all of the exhibits and the transcripts, but we are ready to proceed this morning.

First, the burden is on the -- on Mr. Lee here to establish his grounds for relief under 2255.

So, Mr. McNally, are you prepared to proceed first in the presentation of the evidence?

MR. McNALLY: Yes, Your Honor, we are.

THE COURT: All right. Before we do that, do you wish to make any opening statement or any opening remarks?

MR. McNALLY: Your Honor, if we could, maybe in an effort to hone this down to what I think are the material issues that are going to have to be decided, Mr. Lee entered a guilty plea to possession for distribution of a scheduled controlled substance; to-wit: Ecstasy, in June of 2009. He was sentenced in September of 2009.

[7] The guilty plea was about nine months prior to the Supreme Court's release of United -- of *Padilla versus Commonwealth of Kentucky*. And then the sentencing hearing about six months prior to that.

He filed his motion for 2255 to set aside his -- to set aside the conviction and to vacate the conviction and to set aside his guilty plea. And it's the primarily on a claim of ineffective assistance of counsel for trial

counsel's failure to comply with the mandates of *Padilla*.

The 2255 motion was filed within the one year statute of limitations from his sentencing hearing.

The government has filed their brief or their response and raised a very interesting issue of whether Padilla is retroactively being applied.

And when we get to the closing arguments I can go through the litany of cases that literally have bounced back and forth, including in our own jurisdiction where I -- from what I -- my research even as of last night, the Sixth Circuit has not decided the issue, but there's various different opinions from the different district courts that are in the Sixth Circuit.

[8] The other circuits that have addressed it from the Third, the Tenth and the Seventh, they have literally taken opposing opinions. And I'm sure the United States Supreme Court will eventually have to give us guidance on whether Padilla is retroactively applied.

I thinks that's a -- there -- there's three issues really primarily here. One is, first, even if we had the grounds for the 2255, is Padilla going to be retroactively applied to June of 2009.

And our position is that trial counsel at that time -- the case was in the pipeline and trial counsel has a duty to be familiar with cases that the Supreme Court has taken up on cert.

The second issue is, of course, whether trial counsel advised Mr. Lee of deportation consequences or sought outside counsel from an immigration lawyer to give him advice.

And our position is that that did not happen.

And thirdly is the prejudice prong, the way the courts have been analyzing these decisions have been: One, is there a violation of the first prong *Strickland*, that is an IAC, ineffective of counsel, and I apologize if I say IAC, often I just [9] mean ineffective of counsel, meaning prong one of *Strickland*.

And then two, I call it the what if, would matter or the prejudicial prong. And our position is that Mr. Lee would have gone to trial had he known of the dire consequences of being deported backs to his county of origin, which is Korea, I should have mentioned that to begin with.

Mr. Lee is a guest in our country. He has been here for a long period of time, he's owned restaurants in this community and -- but his citizenship is of Korea.

And he -- he -- he -- and again the standard is not would he have won, this court is not today to engage in a trial, the standard is does he believe he had a reasonable defense and would have exercised his right to his Sixth Amendment right to have a trial had he known of the deportation consequences.

Thank you, Your Honor.

THE COURT: All right, thank you.

And, Mr. Whitmore, do you wish to make any opening remarks before we proceed to put on the proof?

MR. WHITMORE: Briefly, Your Honor.

[10] May it please the court, for the most part what Mr. McNally said I also would agree. However, I think there is a factual dispute that Your Honor is

going to hear, Mr. Fitzgerald did mention to him the possibility of being deported and his issue -- the issue of deportation.

Secondly, what you're going to hear is that there was always a possibility in his mind that that could happen from Mr. Fitzgerald's standpoint, but he did not engage in a full analysis of it as it relates to contacting any immigration attorney, but he specifically brought that issue up.

Next, Your Honor, during the change of plea, and this court knows that if this court were to handle a change of plea and someone was asked the question, are you a U. S. citizen and that person responds no, this court would at that point advise the person of deportation as a possibility.

In this particular case Judge Donald did that.

To the extent, Your Honor, there's an issue of -- and I believe it goes beyond whether or not there would be a different outcome, that had he known the possibility of being deported that he would not have pled guilty.

[11] But I think Mr. McNally pointed out that did he have a plausible defense that would allow him to prevail. And Mr. Fitzgerald is going to testify that based on his analysis in looking at the evidence he did not think he did and that was one of the reasons that he pled guilty.

If he had a plausible defense, I think Mr. Fitzgerald is going to testify he would have taken this case to trial.

And -- and the court know we should not get into a full-blown issue as it relates to a hearing, but we must access whether or not he had a plausible defense. And -- and so for the purpose of -- of this

hearing, Your Honor, we would certainly be relying on the evidence that would be presented to this court as well as what we have filed in our motion.

Thank you.

THE COURT: Thank you, Mr. Whitmore.

All right. We will proceed to hear the proof.

Mr. McNally, you may call your first witness.

MR. McNALLY: Your Honor, we would call [12] Mr. Lee.

THE COURT: All right. And is there a rule -- does anybody request the rule of sequestration of witnesses?

MR. McNALLY: Please, Your Honor.

THE COURT: Mr. -- Mr. Fitzgerald, I believe you may be a witness in this case today instead of an attorney today. So I will ask you to wait in the witness room until you are called.

And you have been provided the lapel mics, too, if you would want to put those on, you may.

All right. And, Mr. Lee, you have been called as a witness stand. If you will stand, please, and be sworn in, and then you may have a seat over here in the witness box.

You can come forward to be sworn in.

All right, that's good.

THE CLERK: Do you solemnly swear or affirm, under the penalties of perjury, the testimony that you are about to provide the court in this matter will be the truth, the whole truth and nothing but the truth, so help you God?

THE WITNESS: Yes.

THE CLERK: Thank you, please be seated.

MR. McNALLY: Candidly, Your Honor, I'm [13] kind of more comfortable at the podium if that's all right.

THE COURT: And that's fine, and you don't need the lapel mic on if you are at the podium. I think we are picking your voice up just fine and as long as Mr. Dudley can see and hear you.

MR. McNALLY: It's just easier for me to look at Mr. Lee from here rather than turn sideways. So --

THE COURT: Thank you.

MR. McNALLY: Thank you, Your Honor.

[14] **JAE LEE,**

was thereupon called as a witness on behalf of the Petitioner, and having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. McNALLY:

Q. Mr. Lee, you've been identified before you took the witness stand, but for the record and for everyone in the courtroom, would you please state your full name and just give us a little background about where you are citizen, and a little bit about when you came into this country and where you started to live here.

Okay.

A. Yes. Hello --

THE COURT: And, Mr. Lee, the same thing applies to you, let me get you to speak directly into the mic and you may want to slide up as far as you can to make sure Mr. Dudley can see you as well.

Thank you.

A. Well -- good morning.

My name is Jae Lee. I came to United States 1982 as a legal permanent residence, my family. And we came through, I believe it was somewhere Alaska was cold, and then came to Brooklyn, New York. [15] That's where my parents had moved into apartment, and that's where I went to junior high school. And my parents open up a little coffee shop, upper Manhattan, New York.

All my life that's where I grew up until after high school, where I graduate from a business high school in Manhattan, New York. Then I move to Memphis around -- I've been there about a little over 22 years. And I worked in a restaurant for about three or four years, then I opened my own business, little help from my parents.

And I had a business for about a little over 20 years. And I also have another second restaurant I opened up and I also have that around six years, also.

And that's all I've been doing my life working 12 hours a day, seven days a week, and it's the only thing I'm good at is the restaurant business.

Thank you.

Q. Okay. Mr. Lee, how old are you currently?

A. I'm 43.

Q. And you came into this country, as you described, sometime during elementary or junior high school, correct?

[16] A. Junior high school.

Q. All right. And you attended school in New York city -- in the state of New York?

A. Yes.

Q. And completed high school, too?

A. Yes.

Q. And so then most of your teenage years or all of your teenage years, and including currently to this date, your adult life has been in the United States of America?

A. Yes.

Q. Significantly longer period of time than you had been in Korea, your country of birth?

A. Yes.

Q. Which country do you consider to be your home?

A. USA.

Q. Okay. Now let's describer what a legal permanent residence means.

You're familiar with that terminology, right?

A. Yes.

Q. Okay. Having come into this country as a legal permanent residence, that means that you can stay in this country permanently, correct?

A. Yes.

[17] Q. Okay. Do you have to occasionally reapply for what's sometimes referred to as the green card for permission for staying in the country?

A. No, I don't.

Q. Okay. In fact, you are able to stay here permanently unless something happens that would remove you, correct?

A. Yes.

Q. Okay. Do you have family still in this United -- in the United States of America?

A. Yes. Both of my parents is here and they still live in Brooklyn, New York and they are United States citizens.

Q. Okay. So they -- they did become citizens?

A. Yes.

Q. All right. Now you mentioned that you moved to Memphis, Tennessee?

A. Yes.

Q. And started working in the restaurant business?

A. Yes.

Q. Okay. What was the name of the first restaurant that you had opened up?

A. It called Mandrin Palace Chinese Restaurant.

Q. And where is that located?

[18] A. It's in Bartlett, Tennessee.

Q. All right. And then you opened a second restaurant, correct?

A. Yes.

Q. And where was that?

A. It's in Memphis, Tennessee.

Q. Okay. Now I'm going to jump a little bit ahead here.

In June of 2009 you entered a guilty plea in Federal District Court here in Memphis, Tennessee in the Western District of Tennessee, correct?

A. Yes.

Q. And you were sentenced in September of 2009?

A. Yes.

Q. All right. Did you get a sentence to serve?

A. Yes.

Q. All right. What was that sentence?

A. Twelve months and one day.

Q. Okay. Followed by three years supervised release?

A. Yes.

Q. Okay. Did you go and serve your sentence?

A. Yes, I did.

Q. While you were serving your sentence, were you able to keep your restaurant or restaurants [19] going?

A. It was real hard, but I still managed to keep it open.

Q. Okay. One or both of them?

A. Both of them.

Q. Both of them. Okay.

And since serving your sentence, then you went into the custody of ICE, correct?

A. Yes.

Q. And what does ICE stand for?

A. Immigration Custom Enforcement.

Q. Okay. And they took you into custody when?

A. December 8, 2010.

Q. Okay. Now have you -- and you have been in their custody in Oakdale, Louisiana or Millington, Tennessee --

A. No --

Q. -- since then, right?

A. Oakdale, Louisiana and Jeanah (phonetic), Tennessee.

Q. Okay. Now have you been able to keep your restaurants going?

A. Yes.

Q. Okay. Been difficult?

A. Very difficult.

[20] Q. Okay. How have you been able to keep your restaurants going while in custody?

A. Well, I just have lucky enough landlord is just waiting for me to, you know, get back on my feet and come out.

So I would say I'm very lucky man to have people like that, you know, waiting for me regardless -- regardless I'm behind on so many things, because they know I'm in suppression and finished up my things that I have to finish and that was giving me the chance to, you know, come out and run the restaurant.

Q. All right. So you've been -- you -- you moved here with your parents to the United States of America, you were educated here, you opened businesses, and you still have businesses going here?

A. Yes.

Q. Okay. Now, and prior to ICE picking you up in December of 2010, you've never had any difficulty remaining in this country, correct?

A. Correct.

Q. Were you eventually charged, and some of these questions are going to be obvious, but I'm asking them kind of open-ended to you, okay.

[21] Were you eventually charged in the Federal District Court for the Western District of Tennessee with a criminal offense?

A. Yes.

Q. And what was that offense?

A. It was possession with intent to distribute ecstasy.

Q. Okay. Did you hire a lawyer?

A. Yes, I did.

Q. Who was that?

A. It was Mr. Attorney Larry Fitzgerald.

Q. Okay. Do you remember roughly how long before your guilty plea in June of 2009 that you had hired Mr. Fitzgerald?

A. Probably four months.

Q. Okay. Let me see if I can help you a second.

You were indicted, do you remember being indicted in January of 2009?

A. Yes, uh-huh.

Q. Okay. And obviously the indictment was served on you, right?

A. Yes.

Q. Okay. Did you hire Mr. Fitzgerald before or after you were indicted?

A. After I was indicted.

[22] Q. Okay. And he was the only attorney representing you on this charge, correct?

A. Yes.

Q. All right. Did he go over the indictment with you?

A. Yes.

Q. Did he talk about the United States Sentencing Guidelines that might be applicable to your case?

A. No.

Q. Okay. Did he talk to you about possible defenses on the case?

A. Yes.

Q. Okay. And did you tell him what you thought were some viable defenses that you would have in the case?

A. Yes, I did.

Q. Okay. But a decision was made to enter a plea of guilty, correct?

A. Yes.

Q. What was the -- what was that decision, I'm going to ask you to share it with us now in your discussions with Mr. Fitzgerald what brought you to the decision to enter the plea of guilty to the charge?

[23] A. He said we could make out, you know, a simple possession or CI's credibilities, entrapment defense, but he said it's a litigation risk going to trial, and it's very risky going to trial with that and if you losses, you are looking at three to five years, and they will sic deportation on you --

Q. Uh-huh.

A. -- so instead of going through all of that, why don't we take look at the plea deal, what the government offer you. And he advised me there was -- for exchange for my plea, guilty plea, the government will deduct three point for acceptance of responsibility, and safety valve, they won't object to safety valve, and they are not going to seek deportation. Just because the safety valve you might have -- get probation, you probably have house arrest --

Q. Okay.

A. -- and go through the drug program.

Q. All right. I asked you a question about whether Mr. Fitzgerald discussed with you the United States Sentencing Guidelines and you had said no, probably

a better question would be he discussed possible sentences with you, didn't he?

A. Yes.

[24] Q. Okay. Sentences that you could be looking at, as you described, three to five years?

You will need to say yes or no for the record, okay.

He discussed with you sentences of possibly three to five years if you went to trial?

A. Yes.

Q. Okay. And then he discussed with you things like acceptance of responsibility, and he discussed with you safety valve, and -- and the government's offer, right?

A. And not seek deportation.

Q. And not the seek deportation. Okay.

And that was goes into the next area that I was going to ask you about.

Mr. Fitzgerald did talk about the possibility that this could result in deportation with you, didn't he?

A. Yes.

Q. All right. And that was in consideration if you went to trial the government could seek deportation, right?

A. Yes.

Q. And then he said if you, from what you testified today, that if you accepted the plea [25] bargain that they would not seek deportation?

A. Correct.

Q. He did not ever talk to you about the fact that if you pled guilty to this offense it was automatic deportation, did he?

A. No.

Q. He did not ever discuss with you the terminology like an aggravated felon would result in automatic deportation, did he?

A. No.

Q. He didn't talk to you about the fact that if you pled guilty to possession or possession with the intent to distribute scheduled controlled substance like ecstasy, you would be deported?

A. He didn't talk about that.

Q. He didn't -- did he ever meet with you with an know immigration lawyer?

A. No.

Q. Okay. Did he -- did he ever direct you to an immigration lawyer to go hire an immigration lawyer to discuss the case?

A. No.

Q. Now I want to backup a second, I forgot to ask this question, did you hire Mr. Fitzgerald or was he appointed to represent you?

[26] A. I hired Mr. Fitzgerald.

Q. Okay. So there were no discussions about getting reliable information about whether this guilty plea would result in deportation?

A. No, not at all.

Q. Okay. Did he ever discuss with you that the U. S. Attorney cannot guarantee that you would not be deported -- be deported by ICE or an INS judge?

A. No.

Q. Okay.

A. Can I say something?

He --

Q. Yes, I guess so.

THE COURT: Go ahead, it's up to you.

BY MR. McNALLY:

Q. Yes, Mr. Lee, go ahead. It's your day today.

A. Every time I ask him about that because, you know, I was worried about the deportation, my immigration status. And he always said why you are worrying about something that you don't need to worry about, you have been in the United States so long they cannot deport you. Even if they want to deport you, it's not in the plea agreement, the government cannot deport you. So he was like, one point he was pretty upset because every time [27] something comes up I always ask about immigration status.

Q. It was as if the immigration question was sort of a road block of getting through the guilty plea?

A. I guess, you know.

Q. And I -- I apologize for characterizing things here, Your Honor.

A. That's all.

Q. I'm sorry?

A. That's all.

Q. Okay. Thank you, that is helpful.

Mr. Lee, you're obviously a businessman as well as understanding how to -- how to prepare food in -- in the restaurant business, right?

A. Yes.

Q. As a businessman, if you thought you were going to be deported, would you have started making arrangements to sell your restaurants?

A. Yes.

Q. Why?

A. Because I'm not going to leave behind, you know, for -- for other people to suffer that I'm getting deported and leave all of that stuff behind, you know, I will make arrangement to sell the [28] restaurant, make sure those peoples that work for me, you know, knows that they are going to have a job or all of the other stuff.

Q. Okay. So you would want to reap the profit of the hard work you put in and also take care of the people who were working for you to make sure there was some transition to a new owner to run the restaurant?

A. That's correct.

Q. All right. Would you have started making some arrangements with your family that's still here in this county?

A. The only thing I have is my parents, and they are pretty old right now --

Q. Okay.

A. -- and I'm the only child left to take care of them and so I don't know they are going through a hard time right now.

Q. So that would be something to consider about whether you are going to be deported as a result of your guilty plea or not, the care of your parents?

A. Yes.

Q. That was a lousy question.

The care of your parents is a factor to consider if you thought you were going to be [29] deported?

A. Yes.

Q. Okay. Did you engage in -- well, first, did you think that you would be deported as a result of the guilty plea?

A. Not at all.

Q. And is that for the reasons that you have already stated in your conversations with Mr. Fitzgerald?

A. Yes.

Q. All right. Now during the guilty plea, during -- during the hearing on the change of your plea to guilty; you remember that, right?

A. Yes.

Q. And you were present in court?

A. Yes.

Q. You reviewed a transcript of that?

A. Yes.

Q. And in there the judge actually asked you, do you understand this could result or this might, I think the word was might possibly result in deportation?

A. Yes, she did.

Q. Or even that you might not be able to become a U. S. citizen?

[30] A. Yes.

Q. Both of those are in there --

A. Yes.

Q. -- in the same sentence nearly?

A. Yes.

Q. Okay. The fact that it might result in deportation or, if you are not deported, you might not be able to become a U. S. citizen?

A. Yes.

Q. Okay. To you was that a lot of mights, maybes, could bes?

A. Yes, might, might deportation, might not become a U. S. citizen, but she also say, if you do become a U. S. citizen, I would lose certain benefits.

Q. Right, you would lose some benefits because of a drug conviction if you became a U. S. citizen?

A. Yes.

Q. All right. When the *Padilla* decision came out, what did you do?

A. When I first read the *Padilla* decision?

Q. Yes, sir.

A. I said, well, this just like me, almost exact same as what I'm going through right now.

My trial attorney, Mr. Fitzgerald, not only [31] did -- not only did he not advise me of the, you know, automatic mandatory deportation if I plead guilty to possession with intent to distribute ecstasy, but he actually advise me if I take the plea, I will not be deported.

Q. Okay. So a lot like Mr. Padilla, you had been in the country 20, 25 years, been a businessman and were making the decision whether to plead guilty to and take the government's offer or not with the idea that you would not be deported?

A. Yes.

Q. Okay. Was there any question in your mind that you could or would or might be deported?

A. At the time, no.

Q. Okay. Obviously by December of 2010 you became painfully aware of it?

A. Yes.

Q. Okay. You filed your own motion for a 2255, didn't you?

A. Yes.

Q. Okay. And you submitted all of the supporting information that's attached to it as -- as exhibits, correct?

A. Yes.

Q. All right. One of those exhibits was a [32] letter from Mr. Fitzgerald to you, is that correct?

A. Yes.

Q. Would you please tell us a little bit about the circumstances regarding obtaining that letter?

A. Well, when I was incarcerated I was talking to the case manager, and she told me that after I finish my sentence I would have a detainer from ICE. And I asked her why is that? And she said, you know, you might be deported. So that's when I contact attorney Fitzgerald say, what's going on, you know, I'm over here and they say after I finish my sentence that I will get deported. And he said, nah, they not -- you are not getting deported, don't worry about it, maybe because you have a ICE detainer on you that want to make sure that you are here legally and in prison there's a lot of people have no paper, they are here illegally.

So I go back to my case manager and ask her, I say, is anybody in this prison that's illegal -- illegal, I mean, what's going on. And she said everybody in this prison, after they done time, they all get deported.

That's when I contact Fitzgerald again and ask him, okay, the INS going to come visit me soon and I need you tell me like you -- we had agreed [33] with

the U. S. Government that they would not seek deportation on me if I take the plea. So that's what the letter came from, Mr. Fitzgerald said, okay, I'm going to write this letter to INS so you can show it to them that the government is not seeking deportation of me.

MR. McNALLY: I don't know the protocol here, but if I may present a document to the witness, please.

THE COURT: And you have shown that to Mr. Whitmore?

MR. WHITMORE: Yes, he did.

MR. McNALLY: I did.

MR. WHITMORE: No objection.

THE COURT: Okay. You may pass that to the witness.

BY MR. McNALLY:

Q. Mr. Lee, take a moment to look at the piece of paper I've handed to you, please.

Do you recognize that sheet of paper?

A. Yes.

Q. What is it?

A. It's a letter from Mr. Fitzgerald.

Q. Is it the one that you have been referring to here today?

[34] A. Yes.

Q. Could you read it, please --

MR. McNALLY: Well, actually I need to ask to have it marked as an exhibit prior to reading it, Your Honor.

THE COURT: All right. Any objection?

MR. WHITMORE: No objection, Your Honor.

THE COURT: All right. We will mark the letter from Mr. Fitzgerald Exhibit 1.

If you will pass that, Mr. Lee, to Ms. Guy right here, and she will put a sticker on it.

Thank you.

And that is admitted into evidence.

MR. McNALLY: Thank you, Your Honor, I was going to ask to do that after he read it, but that will be great.

Thank you.

(Exhibit Number 1 was marked; Description: Letter.)

BY MR. McNALLY:

Q. Mr. Lee, would you please read out loud what the letter says?

A. It says:

"To whom it may concern:

"There was never any discussion of [35] deportation during the negotiation -- negotiation of the plea agreement or during the sentencing. It was my understanding that the government was not seeking deportation of Mr. Jae Lee.

"Please feel free to contact me at my office if you need for further discussion concerning this matter.

"Larry Fitzgerald."

Q. Thank you.

If you can hand that back to the court, please.

And is that consistent with what your understanding of -- that the government was not seeking deportation of you?

A. Yes.

Q. All right. And when you heard the word government, what did that mean to you?

A. I means to me it's government, judge, prosecutor, and the whole United States.

Q. Okay. Well, let me breakdown the whole United States then for you, okay.

Obviously you mentioned the judge, the prosecutor, and when you say prosecutor, you mean a member of the U. S. Attorney's office, right?

[36] A. Yes, it did, I'm sorry.

Q. Did that also in your mind mean INS or Immigration Naturalization Service?

A. Yes, the whole -- yes, that's what I meant, the whole United States.

Q. Okay. ICE as well?

A. ICE, INS.

Q. All right. You said you did discuss with Mr. Fitzgerald possible defenses of your charges, right?

A. Yes, correct.

Q. Did he go over with you what the government would have to prove beyond a reasonable doubt to find you guilty of the charge of possession with the intent to distribute ecstasy?

A. No, he did not.

Q. Okay. Did you know what the proof was though?

Did you know that -- obviously you know that a search warrant was conducted of your premises?

A. Yes.

Q. And what, 96 pills, I believe it was, was found in your -- in your --

A. No, that's incorrect.

Q. Okay. How many pills were found?

[37] A. There was 85 --

Q. Okay.

A. -- but I was -- I would let Fitzgerald know that all the numbers are incorrect. He says it doesn't make -- it doesn't matter.

Q. All right. And so in the discovery it said 96, but what you said --

A. 85 --

Q. -- was 85 --

A. -- 88, 80, I don't know, it's all different.

Q. Okay. And did you know that there was a confidential informant involved in the case?

A. Not until I saw a PSR.

Q. Okay. And this -- supposedly this confidential informant had sold you some ecstasy at times?

A. Sold me some or --

Q. Yes.

A. No.

Q. Okay. Now let me ask you then, what in your mind would have been possible defenses of the charges against you?

A. For simple possession, for personal use of ecstasy, like a party, go party and give it away friends. And the only reason I got that for CI is [38] he was -- I was doing a favor for him to get some ecstasy for him for his going to the party.

Q. Okay. So you held some ecstasy and you would use it?

A. Yes.

Q. Okay. You know that's against the law?

A. Yes.

Q. And your thought was that the possible defense was simple possession?

A. Yes.

Q. Okay. You also had some concerns about the validity of the search warrant, correct?

A. That's correct.

Q. Okay. And in exchange for the plea offering, you gave up challenging the search warrant?

A. That's correct.

Q. I think, and I believe you discussed it with me as a motion to suppress the evidence obtained as a result of the search warrant?

A. Yes.

Q. All right. Did you discuss with Mr. Fitzgerald the points that you thought were in error of the government's proof?

A. Yes, I did.

Q. You brought those out to him?

[39] A. Yes.

Q. Including things stated in the affidavit for the search warrant?

A. Yes.

Q. What did he say?

A. Don't worry about it.

Q. Because you were entering the plea of guilty?

A. Correct.

Q. All right. Did he discuss with you that you have to give up filing a motion to suppress the evidence taken from your home if you were going to go forward with the plea of guilty?

A. Yes, he did.

Q. Okay. And did you understand that was also part of the guilty plea was surrendering or giving up challenging the evidence?

A. Yes, correct.

Q. All right. Had you known that you were going to be deported, what would your decision have been?

A. I would have been taken to a trial all the way with my strong evidence and my witnesses.

Q. What would your witnesses have said?

A. Well, they would say exactly what I stated, I'm not a distribute drugs, I'm a hard working man in restaurant. I may party using ecstasy and give [40] it away to friends, that's what my witness would say.

Q. Okay. Did you identify these witnesses for Mr. Fitzgerald?

A. Yes, I did.

Q. Okay. Do you know if he ever went out to interviewed them?

A. No.

Q. Did he have ever have them come into is office to interview them?

A. No.

Q. Okay. You described it before that there was -- the words you used was litigation risk; was that what Mr. Fitzgerald told you about?

A. Yes.

Q. Okay. So is it your testimony today, had you known of the consequence of being deported that you would have engaged in the litigation risk?

A. Yes, sir.

Q. Including challenging the evidence that was seized from your home?

A. Yes.

Q. And if you lost on that, then proceeding to trial with your witnesses and your proof?

A. Yes.

[41] Q. Okay. For everyone's benefit, would you please tell us today where you stand on the deportation proceedings?

A. I don't quite understand that.

Q. I apologize.

Obviously you are being held in Louisiana?

A. Yes.

Q. By ICE?

A. Yes.

Q. Okay. Where are you in the process of INS regarding being deported, not deported, or where do you stand?

A. I've been ordered deported since August 2011.

Q. Let me make sure that's clear on the record what you said.

You have been ordered deported since August of 2011?

A. Yes.

Q. And why have you not been deported?

A. Because for this -- the motion I filed and I've -- my embassy to get a travel document, they would not

give me a travel document, they feel that I have strong case of win this case. And then somebody wrongfully back to country that they never been before and destroy their life and everything [42] they are accomplishing in the United States.

Q. Okay. So we're real clear I'm going to repeat, and, please correct me if I state anything wrong. Okay.

The Korean will not issue you travel documents in your -- for your country of origin, your country of birth because you really have no ties there and they feel like you have a chance of prevailing here to get your case, your -- your guilty plea set aside?

A. Yes. And they don't want to destroy my family wrongfully by sending me there, they found that I'm innocent, and it would destroy my family, my parents, and my business all the 20 years I accomplish for my restaurant business.

Q. Okay. I'm going to step out here.

Mr. Lee, is there anything that I have failed to ask you that you feel is important and relevant to the proceedings today because it is your day in court?

A. No.

Q. Okay. Sit tight, you will have to answer the Assistant United States Attorney's questions now. Okay.

A. Okay.

[43] THE COURT: Thank you.

Mr. Lee, you do have water there if you are able to get that water.

Okay. Mr. Whitmore, you may cross examine Mr. Lee.

CROSS EXAMINATION

BY MR. WHITMORE:

Q. Good morning, Mr. Lee.

A. Good morning.

Q. My name is Kevin Whitmore and I represent the United States. I want to ask you a few questions as it relates to this. And -- and I think it's better if we start where we left off as it relates to the charges that you are facing.

Now it is -- it is your understanding that you were charged with possession with intent to distribute ecstasy?

A. Yes.

Q. It is also your understanding that there was a search, not necessarily your understanding, in fact there was a search warrant executed at your residence, correct?

A. Yes.

Q. Okay.

MR. WHITMORE: And may I approach, Your [44] Honor?

THE COURT: You may.

BY MR. WHITMORE:

Q. Mr. Lee, how long have you been using ecstasy?

A. Pretty long time.

Q. Okay. And how long have you been giving ecstasy to friends?

A. Pretty long time.

Q. And you do know that ecstasy is a illegal substance?

A. Yes.

Q. As a matter of fact, when you purchase ecstasy, you make sure that you -- you -- you purchase it in a way where -- where it is not known that you are, in fact, buying ecstasy, is that correct?

A. Yes.

Q. Because you understand the illegal nature of it?

A. Yes.

Q. And you understand, in fact, there may be consequences if you are caught with ecstasy, correct?

A. Yes.

[45] Q. I would like to show you --

MR. WHITMORE: Your Honor, may I have this as a composite exhibit since they are photos or would you prefer one --

THE COURT: A collective exhibit is fine.

Any objection --

MR. McNALLY: No, Your Honor.

THE COURT: -- Mr. McNally?

All right. You want to -- we will mark two for identification.

MR. WHITMORE: Yes, for identification.

THE COURT: Yeah.

(Exhibit Number 2 was marked; Description: Photographs.)

BY MR. WHITMORE:

Q. Let me know whether or not you recognize these documents?

A. Yes, I recognize them.

Q. Can you briefly tell the court what -- what these are photos of?

A. This one when they executed a search warrant at my residence, and I had obtained this little, like CD disk looking from Mr. Fitzgerald. He gave it to me and told me to look at it for yourself.

Q. So you actually received a CD of these [46] pictures?

A. Yes.

Q. And this is just a dov'nload or copy of these other pictures --

A. Whatever it is on the CD, yes.

MR. WHITMORE: Your Honor, at this time I would like to offer into evidence --

A. But he never looked at it though. Mr. Fitzgerald never looked at it. He gave it to me to look at it. When I bring back the CD he said what was in it, so I told him what was in it.

THE COURT: All right. These pictures will be marked collective Exhibit 2 and admitted into evidence.

(Exhibit Number 2 was marked; Description: Photographs.)

MR. McNALLY: Your Honor, if I may inquire, we need to make a note, how many pictures were there?

THE COURT: Let's see, one, two -- seven.

MR. McNALLY: Thank you, Your Honor.

THE COURT: Thank you.

BY MR. WHITMORE:

Q. If you can can you describe, and we are just going to turn the page, can you describe the first [47] document, the first photo?

A. It's my book case shelf.

Q. Looking more for a box, is it cigarettes?

A. Just cigarettes.

Q. Is that where you hid the -- the ecstasy?

A. There was some in there.

Q. I mean, did you intend to put them in there in order to hide them?

A. No.

Q. Well, why would you put ecstasy in a -- in a --

A. Because when I go out -- when I go out party and stuff, I put it in there to carry it with me.

Q. In other words, you don't want it -- you don't want it known that you are in possession of illegal substance, correct?

A. Yes.

Q. Okay. And if you turn the page.

And is that a copy of it, once you open up the Marlboro box?

A. I can't really see what's in there, it just, to me, it's just plastic wrapper.

Q. Okay. Turn the page.

And what do you see next?

I think that would be the third sheet?

[48] A. Yes, it's the third sheet.

Some papers, pictures, staplers and --

Q. So that's of your book case, is that a picture of your bookcase?

A. Yes.

Q. And where would you conceal the illegal substances that the ecstasy, would you conceal it in that area?

A. What do you mean I conceal the area?

Q. I mean, would you hide the drugs in -- in that particular area?

Where that photo is?

A. No, it wasn't over there.

Q. Okay. Can you turn the page.

THE COURT: Counselors, let me ask a question here, this is bothering me right now, if he prevailed on his 2255 and the conviction was set aside; does that mean that he can be retried; can his testimony here be introduced as evidence.

MR. WHITMORE: Yes, Your Honor.

THE COURT: All right. I mean, is this a proper line of questioning in between -- in the 2255 because I'm trying to decide if it exceeds the scope of the direct.

MR. WHITMORE: Your Honor, to the extent [49] that the defendant has taken the stand in a 2255 to put on evidence to support his claim, it's -- it's -- it's -- it's pertinent that we get into the issue of whether or not he would have prevailed if we are talking about the second prong, the prejudice. And the prejudice, from the government's position, Your Honor, is not whether or not he would have, in fact, gone to trial. The question is whether or not he had a plausible defense that would allow him to prevail.

And this line of questioning is only highlighting that he kept the drugs in a surreptitious manner in his home establishing knowledge that he knew he was in possession of illegal substance, that they were hidden in a way that the officers had to find them.

The next line of questioning, and I can just make an offer of proof, Your Honor, was that he has stated

that he had a defense and his defense was that he gave this to individuals, didn't sell it.

I was going to bring up the fact that Mr. Lee was involved in a proffer. I have the proffer letter where he specifically signed it that basically states that if he ever were to testify in a manner that is different than the information that [50] he provided in the proffer, it could be used to impeach him.

So I was going to impeach him. In that particular -- in that proffer he -- he states of different instances where he sold it. He -- he purchased it for six dollars and sold it for $20.

I also, Your Honor, was going to bring out the fact that --

THE COURT: Well, I certainly agree with that and he did testify that he gave it to friends and he would have witnesses that would testify to that.

He also stated on direct that he knew it was illegal to possess ecstasy. And so I'm kind of confused where we're going with the how he stored it and were these the pills. And he said there were anywhere from 85, 88 to 95 pills discovered in his residence as part of the search warrant.

But if there is no objection from Mr. Lee's counsel, I will allow you to proceed.

MR. McNALLY: Your Honor, as long as we are here, rather than interrupting again, I would object to the initial detail about where he kept them and what he would do, and what his intent was.

I think the point is being made that and [51] the photographs have been identified and they are introduced as evidence now, of what occurred during the search of the premises. And I think that is what

is relevant here, not what his intent was or why he was dealing or packaging. And it sounds like they have enough ammunition without having to go through this line of questioning with Mr. Lee.

MR. WHITMORE: If I may add, Your Honor?

THE COURT: Yes.

MR. WHITMORE: And -- and I can move on from this.

THE COURT: Yes.

MR. WHITMORE: But I think it's important when you look at the surreptitious nature of how he's concealing the drugs that where Mr. Lee is basically representing to the court that my defense was personal use.

So, when we look at the way it was packaged, the amount of drugs, so I think one of the issues that he -- he raised was that it was for personal use. The next defense he said he said he was going to assert that he would give it away.

So I can move on from that. I think the photos speak for itself, Your Honor.

THE COURT: Yes.

[52] MR. WHITMORE: But I -- I just wanted to point out the -- the way that it was concealed that he understood that this was something more than just personal use based on how he concealed this even in his home.

THE COURT: All right. Well, I will allow you to continue. I don't think he's testified that he understood that he said it is for more than personal use. So I will allow you to continue to a limited extent.

So you may proceed.

MR. WHITMORE: Okay.

BY MR. WHITMORE:

Q. Those photos represent the way you maintained the drugs in your home --

A. No --

Q. -- is that --

A. -- no.

Q. Okay. How did you maintain the drugs in your home?

A. It was just in one bag on a corner right by the book shelf.

Q. Was there anything concealing it from was -- were there books behind the book shelves?

A. It was side of kind of between the book shelf [53] and a wall --

Q. Okay.

A. -- and but it wasn't separated like this, not what is shown in the pictures.

Q. I'm not talking about the specific drugs, but I'm talking about the drugs in the bag, the 88 pills that you had in the bag?

A. Yeah, but this is like the wrapping like a certain amount individually in the pictures --

Q. Okay.

A. -- it wasn't like this.

Q. Okay. The -- the last picture where they are separated?

A. Yes, uh-huh, it's all separated, it wasn't like that, it was just one --

Q. Okay.

A. -- one bag.

MR. WHITMORE: May I approach, Your Honor?

THE COURT: Yes, you may.

BY MR. WHITMORE:

Q. I would like to show you the next exhibit in order for identification and you can tell me whether or not you recognize it.

A. Yes, I recognize this letter.

Q. And if you turn to the -- if you would turn [54] to the second page. And for the record, it's a two-page document.

Is that a two-page letter?

A. Yes.

Q. Okay. Is that your signature on the second page?

A. Yes.

MR. WHITMORE: Your Honor, at this time I would like to offer that as the next exhibit in order.

THE COURT: Any objection?

MR. McNALLY: No, Your Honor.

THE COURT: All right. This will -- the letter, two-page letter will be marked Exhibit 3 and admitted into evidence.

(Exhibit Number 3 was marked; Description: Letter.)

THE COURT: And I'm going to take just a minute.

MR. WHITMORE: Yes, Your Honor, I apologize.

THE COURT: Thank you.

All right. You may proceed.

Thank you.

MR. WHITMORE: May I approach, Your Honor?

[55] THE COURT: You may.

BY MR. WHITMORE:

Q. Do you recall being -- do you recall participating in a proffer with law enforcement agents from DEA.

A. Well, you know he said proffer, I didn't know that was, he just told me come with me, we are going to talk to law enforcement, and don't worry about it, just tell them what you know and it will not get you anything, they cannot use against anything, whatever happen in that room.

Q. Okay. And it does say that this, your statement in this -- in this proffer session or let's just call it an interview, will not be used against you, is that correct?

A. Yes. He said they can't use against you and I cannot use against them, that's what Mr. Larry Fitzgerald told me.

Q. Uh-huh.

But did you take the opportunity to read the document that you signed?

A. Nope.

Q. Okay. Did you recall that in that proffer that you were asked questions -- let me ask you, is it accurate that in -- that in 1998 that you came to [56] the United States from Korea?

A. 1998?

Q. I'm sorry, 1981?

A. I don't remember it was -- I came in 1982.

Q. Okay. And do you recall telling them that you started off as a waiter at the Chinatown Restaurant at Hickory Hill and Winchester?

A. Yes.

Q. Is that accurate?

A. Yes.

Q. Okay. And do you recall telling them in that meeting that you worked there for approximately three years?

A. Yes.

Q. And is that accurate?

A. Yes.

Q. Do you recall telling them that you opened up Mandrin Palace Restaurant in Bartlett in 1991?

A. Yes.

Q. And is that accurate?

A. Yes.

Q. Okay. Do you recall telling them that you -- you obtained $60,000 from your father Kahn --

A. Kahn Lee?

Q. -- Kahn Lee to open the restaurant?

[57] A. Yes.

Q. And is that accurate?

A. Yes.

Q. Is it also accurate that your father cosigned for you to open up the restaurant?

A. Yes.

Q. And you recall telling them that?

A. Yes.

Q. Do you recall saying that?

Do you further recall advising them that in 1994 you became the full owner of the Mandrin Palace Restaurant in 1994?

A. Okay. Hold on.

THE WITNESS: I'm sorry, Judge, may I talk to my attorney if I can.

MR. WHITMORE: I would object, Your Honor.

THE COURT: I don't -- I don't think that I can allow you to while you are a witness on the stand. Your attorney can make objections to the questions that he thinks are appropriate. If you've got -- what -- do you want to talk to him about your testimony here, about the statements in the proffer?

THE WITNESS: Yeah, the statement of proffer, because according to Mr. Fitzgerald it cannot be used for anything on that that they -- [58] that we talked about at that room.

THE COURT: Okay. And I'm unclear as to this, to, I mean, these -- the proffer wasn't under oath and now it's like we're going through putting on the proffer under oath now.

MR. WHITMORE: Your Honor --

THE COURT: And I'm a little --

MR. WHITMORE: Can I -- can I clarify?

THE COURT: Yes.

MR. WHITMORE: Our, the third line, the third paragraph, in the event the client becomes a witness in any judicial proceedings and offers testimony materially different from any statement made during the proffer, the United States may cross examine concerning any statement made during the proffer.

This provision is necessary to ensure that the client does not abuse this opportunity for a truthful proffer and further to ensure that perjury is not committed while testifying in such judicial proceeding.

He's in a judicial proceeding, he testified that one of his defenses was that he only provided this to friends.

Even though we will argue that's enough [59] for distribution, this proffer, however, he admits that he provided to people for -- he charged. And what I'm trying to do, Your Honor, is, if he's agreeing all of this is truthful in the proffer, then when I ask him specifically about this other information in the proffer and if he were to say now that is not truthful, and that's all I'm doing is establishing --

THE COURT: That's why I was a little confused because I don't think any of the questions that you have asked him so far about what he stated in the proffer impeached him on anything on direct so far.

MR. WHITMORE: No, Your Honor, I'm just making sure that it's truthful as he knows it and then I plan to ask him about this information that's in the proffer.

THE COURT: Mr. McNally.

MR. McNALLY: Yes, Your Honor.

I have a little bit of experience with these proffer agreements over in the middle district and in these same sort of collateral proceedings and my own experience is not to insist that that language not be written but I wasn't here when this proffer was entered into.

[60] I agree with the government that they can impeach Mr. Lee with questions about did you state in the proffer that you made a sale. And if there's another admission of that, then they can ask that question.

I do understand the set up that the Assistant U. S. Attorney is trying to establish to get to that point. I think what's critical here is, and I can't say that that is necessarily not relevant or appropriate for objection, to first ask did you tell the truth in this proffer and then ask the question. But I think we can get to it by getting to the questions that are germane.

THE COURT: I think that's what I'm looking for.

Certainly you can cross examine him about his work in the restaurants and him opening the restaurants, he did testify to that on his -- in direct, and if you want to explore that more fully you are entitled to on cross-examination.

I don't see that any of the statements made in the proffer about working as a waiter for three years and then opening the restaurant is inconsistent or impeaching anything he said on direct, and so that was my concern, okay.

[61] All right. Just that we all agree on the ground rules, I'm going to allow you to continue.

MR. WHITMORE: Thank you, Your Honor.

BY MR. WHITMORE:

Q. Do -- do you recall in the proffer session that -- that you were asked whether or not that when you purchased ecstasy that on one occasion you purchased, that you normally purchase anywhere from 20 to 30 pills at one time at six dollars per pill?

MR. McNALLY: Again, I object to that particular question. I think the question that is germane and relevant to cross-examination is did you in the proffer ever admit to making a sale, not what he purchased.

MR. WHITMORE: Your Honor, one of the issues, Your Honor, is that he was giving this away. I'm first establishing that he purchased it for six dollars, he didn't just sell it to anybody for six dollars, I wanted to get the bottom line price that he paid for it. I'm going to ask the next question do you recall saying -- do you recall selling it on different occasions for as much as 20 dollars.

THE COURT: All right. I will overrule the objection, I will give you some leeway on that.

[62] BY MR. WHITMORE:

Q. Do you recall that you -- you stated in the proffer that you would normally purchase the ecstasy, 20 to 30 ecstasy pills for six dollars per pill?

A. No, I don't recall.

Q. Okay. Do you recall during the proffer that -- stating that -- that if you had large amounts of ecstasy that you would sell them for $15 to $20 per pill?

A. No.

Q. Do you recall that -- that you sold to an individual, I think it's Mike Yeh, J-d-h --

A. I don't know.

Q. -- Y-e -- Y-e-h?

You sold to him and this is from 2000 and 2001 that you sold it to him for $20 per -- per pill.

Do you recall saying that in the proffer?

A. No.

Q. Do you know an individual by the name of Leong, L-e-o-n-g?

A. L-e-o -- no.

Q. Okay. Do you recall any discussion concerning an individual by the name of Leong in the [63] proffer?

A. No.

Q. Okay. Do you recall that initially when you start purchasing from Leong you were purchasing any where from fifty pills at a -- at a given time?

A. No.

Q. And you would agree that if you were purchasing fifty pills at any given time that that would not be necessarily consistent with just your personal consumption?

MR. McNALLY: Objection to the question, Your Honor.

THE COURT: What -- what basis?

MR. McNALLY: Calling for an opinion on his part that it was not a part of the cross-examination about the number of pills and things of that nature, we talked about the pills found at his home, but not about pills purchased by him, and whether that number of pills is consistent with personal use or -- or distribution.

MR. WHITMORE: May I speak, Your Honor?

THE COURT: Yes, you may, uh-huh.

MR. WHITMORE: I mean, based on the quantity that he's buying, he stated that one of the issues that his counsel could have put forth a [64] defense that this was for personal use.

And my question was that if you're buying -- buying fifty at any given time that you would agree that that is not consistent with buying for just personal use.

MR. McNALLY: And my objection, Your Honor, is that he's boxed him into either saying yes, it is not

consistent or no, it's not. The question should be, when -- did you ever purchase fifty pills or more at a time. And if he answers yes, was that for resale or was that for personal use.

So it's as to the form of the question.

THE COURT: All right. I'm going to sustain the objection.

Rephrase the question.

MR. WHITMORE: Thank you, Your Honor.

BY MR. WHITMORE:

Q. Did you purchase, did you advise during the proffer that on one occasion that you purchased fifty pills at one time?

A. No.

Q. You don't recall saying that?

A. No.

Q. Do you recall during the proffer saying that [65] you purchased as many as a hundred ecstasy pills at one time for six -- six dollars per pill?

A. No.

Q. Do you recall saying during the proffer that you used the money from the -- from the sale of ecstasy -- ecstasy, ecstasy -- excuse me -- to pay off pills?

A. No.

Q. Do you recall saying that you had a lot of credit card debt and the business was not going well?

A. No.

Q. And that the ecstasy allows you to supplement your business?

A. No.

Q. And you would agree that there is no dispute that you have distributed ecstasy to friends on numerous occasions?

A. I did not distribute, we use together.

Q. But the drugs would have been purchased by you and you would have provided the drugs to them; would you agree with that?

A. Yes, I would give it for free of charge.

Q. As it relates to the search warrant, do you recall reading this search warrant?

[66] A. Nope.

Q. Do you know that a confidential informant purchased approximately 20 ecstasy pills from you on December 8th?

A. Yeah.

Q. Okay. And you would -- you would agree that on that particular occasion you did distribute the drugs for money?

A. No.

Q. Do you recall that the confidential informant gave you three hundred dollars?

A. Yes, the cost of the pill.

Q. Excuse me, I'm sorry, sir.

A. The cost, whatever was the cost of the pill. Yeah, he give me the three hundred, the cost of the pills.

Q. And you gave him the pills --

A. Yes.

Q. -- as a result of the three hundred dollars?

A. Yes.

Q. And you gave him approximately 15 pills?

A. Yes.

Q. Okay. Did you recall that this transaction was taped, that there was a tape recording?

A. That was according to Mr. Fitzgerald, yes.

[67] Q. Did you ever have the opportunity to listen to the tape recording?

A. I asked for them and he never gave me any tapes.

Q. And you don't -- you didn't get a chance that -- that on two occasion, when you dealt with the confidential informant, that that transaction was taped; do you recall ever listening to the tape?

A. No.

Q. And did he advise you that if you went to trial that the confidential informant would be willing to testify against you as it relates to those transactions?

A. No.

Q. Did you believe that the confidential informant would testify against you?

A. I don't know at that time.

Q. Did Mr. Fitzgerald tell -- tell you about the benefits of pleading guilty?

A. Yes.

Q. And he mentioned to you that you would receive a -- a -- a -- a lesser period of incarceration?

A. No, he said I will be on probation or house arrest and -- yes, probation, house arrest. And if [68] worse case, you will be more than one year. And if you do have to go to prison, you get -- make it through the drug program and a halfway house, that the max you will be doing prison time will be four months.

Q. So, in other words, you realized that you were going to receive a substantial benefit by pleading guilty as it relates to your prison time?

A. What do you mean?

Q. That you were going to receive --

A. Probation.

Q. -- a shorter prison time as -- as probation possibly --

A. Yes, uh-huh, yes.

Q. And did he ever explain to you why you didn't qualify for a safety valve?

A. No, he didn't.

Q. Do you recall --

A. He let me know two days before the sentencing hearing, he say you didn't -- you do not qualify for it, and he say it doesn't really matter because it doesn't go below guideline.

Q. And that was due to, at the time that you were -- the search was executed that you had a firearm in your home, is that -- is that correct?

[69] A. Yes.

Q. And did he not explain to you that as a result of that that you did not qualify for safety valve?

A. No, he did not. He say -- he said it's illegal to have a firearm in the house, but it's illegal if that firearm was involved in your offense and he said I wasn't involved in the offense with the firearm.

Q. Did you have the opportunity to -- to read the Presentence Investigation Report?

A. Yes, I did.

Q. Okay. And so does Mr. Fitzgerald explain to you that you had a right to if you saw anything in there

that was inaccurate, that you could have objected to it -- that he could object on your behalf?

A. Yes.

Q. And you didn't see anything in the PS --

A. I did see every thing --

Q. Excuse me?

A. I id see a lot of things inaccurate I'm sure about the CI in it and some of the statement they made. He told me not to worry about it, he said that's how it works.

[70] Q. But you did have the opportunity to read it?

A. Yes.

Q. And as a matter of fact, during your sentencing you stated that you accept full responsibility for your action and in fact this was the biggest mistake you ever made?

A. Yes.

Q. And as result of that you actually did in fact receive a sentence substantially below the guidelines?

A. Well, I didn't know it was below my guidelines, he didn't tell me anything about what's my guideline was.

Q. Now do you recall if you looked at the Presentence Report, and, I mean, if to be sarcastic, let me rephrase that, I didn't mean it like that.

A. Yes, I know what you are saying, and they have the guideline back there --

Q. Yes, sir.

A. -- he say it doesn't matter what's back there. He's basically telling me it's just there. He did not tell me which section I belongs to.

Q. But you were present when the judge during your sentencing asked you about the Presentence Report?

[71] A. Yes.

Q. And you said that you didn't have any concerns about it?

A. No --

Q. Okay.

A. -- because that is what I was told by Mr. Fitzgerald is not to worry about the PSR.

Q. Now is -- is -- is your understanding, and I just want to make it clear for the record, Mr. Fitzgerald always mentioned to you that there could be a possibility, did he tell you that there could be a possibility that you could be deported?

A. No.

Q. Did he also tell you that you could -- that you were eligible for deportation?

A. No.

Q. Okay. But it -- but it there's no doubt in you're mind today that the judge, in fact, did go over that with you, correct --

A. When --

Q. -- during the change of plea?

A. Yes, he said, he told me it's standard procedure and you have to understand for your plea to be, you know, valid.

MR. McNALLY: If your Honor please, for [72] the record could we have Mr. Lee identify when he said he who he is talking about.

MR. WHITMORE: Okay.

THE COURT: All right. Mr. Lee, would you clarify your answer as to who he was.

THE WITNESS: Oh, that would be attorney Larry Fitzgerald.

THE COURT: Thank you.

BY MR. WHITMORE:

Q. And do you recall participating in the change of plea on June 17th, 2009 before Judge Donald?

A. Yes.

Q. And do you recall that you were asked a question, and you can tell me whether or not this is your answer, you were asked a question:

Are you a U. S. citizen?

And you replied: No, Your Honor.

Do you recall that?

A. Yes.

Q. You further --

MR. McNALLY: What -- what -- what page?

MR. WHITMORE: I'm -- I'm sorry, on page nine, my apologies.

BY MR. WHITMORE:

Q. You further, do you recall the judge saying [73] the following, and this would be your response:

Okay. A conviction on this charge then could result in your being deported --

A. Okay, excuse me, before you read that.

Before the hearing I was advised by Mr. Fitzgerald on the hearing plea changing of hearing they would ask you a lot of standard questions for non-U. S. citizen, so you have to go along with it, understand.

Q. Okay. But I appreciate that, but do you mind, I'm just going to ask you just the questions that were asked.

A. Okay, yes.

Q. Do you remember being asked the following question:

A conviction on this charge then could result in your being deported. It could also affect your ability to attain the status of a U. S. citizen. If you do become a United States citizen, it could affect your rights to participate in certain -- in certain federal benefits such as student loans, does all that at all affect your decision about whether you want to plead guilty or not?

And your -- and your reply was: Yes, Your Honor.

[74] Because at this point you're -- you have a concern?

A. Yes, because I heard deportation.

Q. And then your asked:

How does it affect your decision?

Do you recall being asked that question?

A. Yes.

Q. And your response -- and you responding: I don't understand?

A. Yes.

Q. So at this point you are having a discussion between you and the judge and you are in fact telling the judge, and this maybe based on your discussions with Mr. Fitzgerald, that you're basically hearing something different than you heard before?

A. Yes.

Q. And you understand that the judge, who ultimately makes the decision at this point is in charge, do you understand that?

A. Yes.

Q. And the question was:

Well, knowing those things, do you still want to plead --

A. All right -- excuse me.

[75] THE COURT: Just a minute.

Let him ask --

THE WITNESS: Oh, okay.

THE COURT: -- the question first and then --

THE WITNESS: Sorry.

THE COURT: -- you can answer the question and you explain your answer at that time.

You may proceed.

MR. WHITMORE: Thank you, Your Honor.

BY MR. WHITMORE:

Q. And were you asked the following question and this was your response:

Okay. Well, knowing those things do you still want to go forward and plead guilty?

And you answered: Yes, Your Honor.

A. Yes.

Q. And you understood she was saying knowing those things were referring to the fact that your guilty plea could affect your deportation?

A. Yes.

Q. Okay. Do you recall this particular question as well as your response:

Okay. There has been a plea agreement -- I'm on page ten.

[76] Okay. There's a been a plea agreement tendered. I'm going to ask you to listen as Mr. Roa summarizes the terms of the plea agreement. And let me remind, Mr. Lee, that at any time during this process if you have a question, please feel free to raise it. If you need to speak privately with your lawyer, let me know, and I will let you step back and speak privately with him. Okay.

And your respond was: Yes, ma'am.

A. Yes.

Q. Okay. And you understood any time that based on this information that you are now hearing from the judge that you may have concerns about that she's also given you the opportunity to take them -- to -- to take time to speak with your attorney privately --

A. Yes.

Q. -- and you understood that?

Do you recall reading anything about the deportation in your plea agreement?

A. No.

Q. Okay. As a matter of fact, do you recall the judge advising you during the hearing that any promises that were made to you should have been made -- should be in writing in the plea agreement, [77] do you recall that?

A. Yes.

Q. And do you recall the judge going through a litany of -- of questions of anybody threatened you, anybody exerted any kind of undue influence on you, that -- and your answer was no?

A. Yes.

Q. Okay. And do you recall during the plea agreement the judge actually asked the prosecutor to provide a factual basis for your guilty plea, I mean, to state the facts why they believe you're guilty?

A. Yes.

Q. And then at the end of that the judge turns to you and -- and basically said is that true. And do you recall responding yes?

A. Yes.

Q. Okay.

MR. WHITMORE: May I have a moment, Your Honor?

THE COURT: You may.

MR. WHITMORE: Thank you, Mr. Lee, thank you for your time.

THE COURT: Thank you.

MR. WHITMORE: May I approach?

[78] THE COURT: You may. And I think Mr. Lee has some of the exhibits, too.

All right. Any redirect, and I know everybody probably needs a break, but I just want to finish with this witness before we take a break.

MR. McNALLY: I'll be short, Your Honor, I think.

THE COURT: Okay.

MR. McNALLY: The most violated promise that trial lawyers make, but --

REDIRECT EXAMINATION

BY MR. McNALLY:

Q. Mr. Lee, you were asked several questions from your plea colloquy, the questions and answers during your change of plea hearing; do you remember that from the prosecutor?

A. Yes.

Q. Okay. And he read to you the question about whether you were a U. S. citizen and you said no and that you could be deported or it could affect your yous citizenship or if you become a citizen it could affect certain entitlements as a citizen. Do you remember that?

A. Yes.

Q. All right. And during that what were you [79] thinking the court was saying to you?

A. I don't know, when it comes to me, it's like Mr. Fitzgerald told me, it's just a standard warning for non-U. S. citizen.

Q. Now you were also asked by the court does that at all affect your decision about whether you want to plead guilty or not. And you answered, yes, it does, Your Honor.

And then the court says, okay, how does it affect your decision?

And what -- and your answer was I don't understand.

What did you mean by I don't understand?

A. When I heard, again the deportation word, that's when I say I don't understand, that's when I looked up Mr. Fitzgerald and he kind of whisper and said standard warning.

Q. Okay.

A. So I proceeded to go with the plea.

Q. Which gets to my next point.

And then the court says: Okay. Well, knowing those things do you still want to go forward and plead guilty?

And you say: Yes, Your Honor.

A. Yes.

[80] Q. Why do you say yes?

A. I had advice from Mr. Fitzgerald.

Q. Okay.

MR. McNALLY: Your Honor, I would ask that we now, since it has been referred to and read from several times enter a copy of the change of plea hearing, a transcript of that, please.

MR. WHITMORE: No objection, Your Honor,

THE COURT: All right. Do you have a copy available that we can use?

MR. McNALLY: I do, Your Honor.

THE COURT: All right, thank you.

MR. McNALLY: I will give it to the clerk, Your Honor.

THE COURT: Thank you.

That will be marked the next exhibit

Is that Exhibit 4.

THE CLERK: Yes, Your Honor.

THE COURT: All right. That's a transcript of the change of plea hearing

And I don't need to see it right now.

Thank you.

(Exhibit Number 4 was marked; Description: Transcript.)

[81] BY MR. McNALLY:

Q. Now, Mr. Lee, during the course of the question and answer between you and the judge when you changed your plea to guilty, did the judge ever ask you if your lawyer, Mr. Fitzgerald, went over immigration consequences with you?

A. No.

Q. Okay. So you were never asked about whether you had been given advice that you would be deported or not?

A. No.

Q. Okay. In fact, at that time you did not know that you could be automatically deported for an aggravated felony?

A. Correct.

Q. You understand what aggravated felony is today, though, don't you?

A. Yes, I do.

Q. A felony involving possession for distribution of a controlled substance?

A. Yes.

Q. Both will result in automatic deportation?

A. Yes.

Q. All right. No questions about that?

A. Yes.

[82] Q. Okay. But you are living that right now?

A. Yes.

Q. Okay. During the course of the exchange between the trial judge and yourself on your change of plea did the judge ask you have you discussed with Mr. Fitzgerald or has Mr. Fitzgerald discussed with you any defenses that you might have to the charges?

A. Yes.

Q. Okay. And what did you say?

A. Yes.

Q. All right. And in exchange for the offer that you were being made by the government, were you giving up those defenses, litigating those defenses?

A. Yes.

Q. Okay. Including suppression of the evidence in your home?

A. Correct.

MR. McNALLY: All right.

I have no other questions, Your Honor.

THE COURT: All right, thank you.

All right. Mr. Lee, you may step down. We will take a short break and then do you have other witnesses?

MR. McNALLY: No, Your Honor.

[83] THE COURT: Okay. When we come back, you may put on your witness.

MR. WHITMORE: Thank you, Your Honor.

THE COURT: Thank you.

MR. WHITMORE: Your Honor, how long would you like to go.

THE COURT: Let's say about a ten minute break.

MR. WHITMORE: Okay, thank you.

THE COURT: Thank you.

THE CLERK: The court is now in recess.

(Recess at 11:39 a.m.)

THE COURT: All right. When we recessed the petitioner had finished his proof. At this time the government may put on its proof.

You may call your first witness.

MR. WHITMORE: Thank you, Your Honor.

At this time we would like to call attorney Larry Fitzgerald.

THE COURT: Thank you.

And, Mr. Fitzgerald, if you will come forward there to the center of the courtroom and be sworn in and then you may have a seat in the witness stand.

THE CLERK: Do you solemnly swear or [84] affirm, under the penalties of perjury, the testimony that you are about to provide the court in this matter will be the truth, the whole truth and nothing but the truth, so help you God?

THE WITNESS: I do.

THE CLERK: Thank you, please be seated.

[85] **LARRY FITZGERALD,**

was thereupon called as a witness on behalf of the Respondent, and having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. WHITMORE:

Q. Good afternoon, Mr. Fitzgerald.

A. Good afternoon.

Q. And for the record, would you please state your name.

A. Larry Fitzgerald.

THE COURT: And, Mr. Fitzgerald, let me get you to scoot up as close as you can to the microphone and please make sure that Mr. Dudley, our court reporter, can see you as well.

Thank you.

And may proceed.

BY MR. WHITMORE:

Q. Okay. And what is your occupation?

A. I'm an attorney.

Q. And how long have you been an attorney?

A. 27 years I believe.

Q. And approximately what -- what type of practice do you operate?

A. Mostly criminal.

[86] Q. And has that been for twenty -- 26 years?

A. Mostly criminal, I do maybe 15 percent of something else, but that's about it.

Q. Approximately how many trials have you had?

A. Maybe a hundred -- one hundred at least.

Q. And over your, I guess, your long-term career you have handled many, many cases?

A. Yes.

Q. Do you know an individual by the name of Jae Lee?

A. Yes.

Q. And how do you know him?

A. I represented him in a -- in a federal case over here.

Q. And how did that representation get started?

A. I don't remember. He came in the office and talked to me and we just -- actually the case started

in General Sessions Court because they charged him in General Sessions Court at first I believe. And it came -- they transferred it to the federal courts, and that's how it got started.

Q. Okay. Did you have the opportunity to investigate the allegations against Mr. Lee?

A. Yes, there was lots of discovery that we had that Mr. Lee and I went over.

[87] Q. Do you recall whether or not there was a search warrant?

A. There was a search warrant, that's -- that's how they went into his house the first time, that's how they went into his house, yes.

Q. Did you have the opportunity to look at any defenses of whether or not you thought this -- whether or not you thought the search warrant was defective in any way?

A. I didn't think the search warrant was defective. I didn't think that the search warrant was defective, I didn't think there was a problem with it.

Q. So you believed there was probable cause?

A. I think, yes, I think they had probable cause to search.

Q. Okay. Did you have any discussion with Mr. Lee whether or not you should attack the search warrant?

A. I think we discussed the search warrant. That wasn't -- there's always an issue of a search warrant, you read it and see what it says. If you think it is something that you should attack, you do. If you don't, you leave it alone. You don't waste a lot of time if you think that the search [88] warrant was good, they had proper affidavits and that type of thing.

MR. WHITMORE: I'm sorry, Your Honor, I had to separate it out.

May I confer, Your Honor?

THE COURT: You may.

(Conference between counsel.)

BY MR. WHITMORE:

Q. And -- and you know as it relates to the search warrant there was a confidential -- a confidential informant that they used to purchase the search warrant -- I'm sorry -- to purchase the drugs --

A. Yes.

Q. -- from Mr. Lee?

A. I knew that.

Q. And that served as the basis for the probable cause?

A. Yes, I knew that.

Q. Did you discuss with Mr. Lee any defenses that you may have thought of or that he may have proposed to you?

A. Well, normally what I do I listen to my client to see what he has to say. And what we discussed mostly was the 88 pills that were in the [89] house. How did they get there, where did they come from. Why do you have them, did he have them for his personal use or what did he -- what were -- why were there, that was -- that was the main issue there.

Q. And did you ultimately make a decision or -- or come up with a conclusion as it relates to the 88 pills and how that would affect any theory that you may have?

A. Well, if -- I think they found eight in one place and 88 in another place. And my question to him was

if they found 88, it's hard to stay I have 88 pills for my personal use.

According to him, he said he just -- he didn't even know they were there, they had been there a long time, the 88 pills had been there a long period of time and he had forgotten they were even there. I -- I don't know how that would have served for defenses purposes, but that's what he said.

Q. And what was your understanding for a possible defense against distribution of drugs?

A. Well, it comes down to, could -- could we somehow overcome the state's position that he was selling them or distributing them and said they were [90] for personal use, I mean, it's just simple possession of some pills and not for any purposes.

Q. Okay. Did you believe based on your assessment of the evidence that you could overcome his argument or the government argument that they were for distribution versus personal use?

A. Well, I -- I -- I think you probably could have said that maybe it was for personal use, but for the basis of the search warrant, the fact that perhaps someone -- we discussed a friend of his or someone he knew that may have been the person that said that he was purchasing pills for him. And it -- it just -- I don't know how we get that passed the jury, it would be difficult, let's put it that way, not impossible but it would be difficult.

Q. So you felt it was inconsistent, personal use was inconsistent with the fact that you had a confidential informant who purchased from him or purchased ecstasy for a price, would that be consistent with his argument for personal use?

A. Yes. Him and his friends -- I mean, his -- he never sold them -- well, you don't -- he didn't call it a sale, let's put it that way. Whatever he paid for them, he would give them to his friends for the same price. So it wasn't profitable. He wasn't [91] trying to profit from it. He was just, I guess what they call, scoring some pills for his friends.

Q. Did you look at -- did you have the opportunity to research the law and determine whether or not that's a defense to distribution just because you do -- you do not sell them to someone versus your -- your giving the illegal drugs to someone?

A. Well, I don't think it probably would make any difference. It would just be a matter of whether we convinced the jury. A lot of things that the law says one thing, but if we can convince the jury of something else, then you do.

Q. But what was your professional decision as to the probability of being successful --

A. I thought it was a bad case to try.

Q. Okay. Now did you have any discussion with him concerning his status as -- his status in the United States?

A. I knew he was not a citizen of the United States. We -- we talked about that. And I think that was one of Mr. Lee's main concerns, it wasn't so much the act itself of what happened, it was his main concern was the fact that would they deport him or was that a possibility of deportation.

[92] Q. And what was your response?

A. There was a possibility of deportation. What I said was, and I think I sent him a letter to that effect, I think they have a letter to that effect, what I

said was that there's a possibility that you may be deported. I said I have done several cases where there were people who were convicted, they were not deported, but I can't say they are not going to deport you, I don't know.

I said in that case the state was also -- the government was also seeking deportation, as part of our agreement the government was seeking deportation, I said in this case they're not seeking deportation, but I don't know what immigration will do.

But that was -- that was a big big concern of his I'd say.

Q. Did you ever tell him that -- that deportation was not an issue, that he would not be deported?

A. No, I never told him that it would not -- I didn't tell him that he would not be deported. What I told -- I said deportation on our case, they are not seeking deportation, but I don't know what immigration will do, and I didn't.

[93] Q. And you all did have discussions about that?

A. That was his main concern. The case was pretty cut and dried. The main issue was will he be deported if he's convicted of this case in any manner, felony, misdemeanor, whatever comes out.

Q. Okay. Do you recall participating in a proffer session with your client?

A. Yes.

Q. Okay. And do you recall during that time that he was asked specific questions about whether or not he distributed drugs for money to individuals?

A. You know what, I don't, I really don't remember, I mean, I don't remember, it's been two years ago,

and I just -- I don't remember exactly what was said in that proffer session, okay.

MR. WHITMORE: Your Honor, may I approach?

THE COURT: Yes, you may.

MR. WHITMORE: Okay.

BY MR. WHITMORE:

Q. Now if there was a report made of that particular session, do you know whether or not, if you have the opportunity to look at that report, whether or not that would refresh your recollection?

A. It probably -- it would. I haven't seen it, [94] but it would, yes. If I saw it, it would refresh my recollection.

MR. WHITMORE: May I approach, Your Honor.

THE COURT: You may.

Have you shown that to opposing counsel?

MR. McNALLY: Your Honor, to speed this up, if I could just get a copy when we are concluded here, that would be fine. If I have any objections, I can raise them later. But I'm looking at the first page of the report, what purports to be a report.

THE COURT: All right. And this is a report prepared by the government?

MR. WHITMORE: Yes, it is, Your Honor.

THE COURT: And you have not seen this before, is that correct?

MR. McNALLY: I haven't, Your Honor.

THE COURT: All right. Then you have no objection to him passing it to the witness?

MR. McNALLY: I do not, Your Honor, as long as the witness can say they've seen it first.

THE COURT: All right.

MR. WHITMORE: And -- and then, Your Honor in fact, I'm just offering just to refresh his recollection, I'm not offering it into evidence. [95] And I'm just asking not to read any, would it refresh -- would that refresh his recollection, then I'm going to ask him to recall the events independently of the document.

MR. McNALLY: I have no objection.

THE COURT: All right. You may pass that to the witness.

MR. McNALLY: I just would like to get a copy when the hearing is over.

THE COURT: All right.

MR. WHITMORE: And, Your Honor, may I have this marked for identification only.

THE COURT: Yes, and that will -- and Ms. Guy, what is that exhibit number?

THE CLERK: Five.

THE COURT: That will be marked Exhibit 5 for identification only.

(Exhibit Number 5 was marked; Description: Report.)

MR. WHITMORE: May I approach, Your Honor?

BY PLAINTIFF 1:

BY MR. WHITMORE:

Q. And, Mr. Fitzgerald, I'm not asking you to read it out loud, I'm just asking you to read it and if you can tell me whether or not it refreshes your [96] recollection as to what I have just asked you, if he mentioned during that proffer session about distributing drugs for money?

A. Okay. I remember it.

MR. WHITMORE: May I approach, Your Honor?

THE COURT: You may.

BY MR. WHITMORE:

Q. So, Mr. Fitzgerald, do you recall whether or not during that proffer session Mr. Lee admitted to selling drugs for money?

A. Yes, he did.

Q. Okay. And do you recall -- let me -- let me retract that statement. Have you participated in proffer sessions before?

A. Yes.

Q. With the U. S. Attorney's office?

A. Yes.

Q. And you're aware of the proffer agreements that you as well as your client must sign?

A. Yes.

Q. And do you recall that it has the language in there that -- that this particular session can be used, the -- the statements, if you were to testify differently in a judicial proceedings, differently [97] than what you stated in this meeting today, do you recall that?

A. Yes.

Q. Okay. I -- I guess my final question is that is there any doubt in your mind that you mentioned to Mr. Lee that there was always a risk of deportation?

A. Yes, always a risk. But -- but, as I said, I guess I qualified it somewhat by saying that the government was not actually seeking to deport -- I mean, in our proffer and our agreement the government was not seeking to deport him, but I don't know what

immigration would do and that was the extent, that was it.

MR. WHITMORE: And, Your Honor, I lied, I misspoke, I said that was the last question.

THE COURT: All right. You may continue.

MR. WHITMORE: May I withdraw with that?

THE COURT: You may withdraw that statement, I won't hold you to that.

MR. WHITMORE: Okay.

BY MR. WHITMORE:

Q. Do you recall sending Mr. Lee a letter somewhat contradicting what you are saying in court today?

[98] A. Yes, I recall sending that letter.

Q. And can you explain what is -- what is your understanding of what you were trying -- what was the purpose of that letter to you?

A. I think they had sent me something to -- I think immigration was trying to deport him, and they sent me -- telling me he needed my help. And what I said was, and my understanding of that letter was, I read it yesterday, was that it was saying that as far as my agreement with the government they were not going to take a position on deportation. Sometimes they do, sometimes they want you deported, as soon as we plead, they want you out.

And normally they would tell me that that your client is going to be deported and we want him to agree to be deported. Well, that was a neutral issue. And basically that is what I was saying, that that's really -- that's a neutral issue as far as the government is concerned. But I don't know what would happen -- I don't know what would happen to immigration, I'm not sure.

Q. But the letter specifically states that during plea negotiations and -- and sentencing that there was no discussion of the possibility of deportation?

[99] A. When I read the plea negotiations, when I read the sentencing there was no discussion about deportation -- as far as during the plea discussion, no. But when I read the sentencing by Judge Donald, it was in there.

Q. Okay. I mean, the change of plea?

A. Yeah, when we did the change of plea, it was in there.

Q. Do you recall during the change of plea when -- when Judge Donald was questioning Mr. Lee about the deportation issue and the possibility of deportation, do you recall whispering in his ear to disregard that?

A. No, I didn't say disregard that, I don't think I said disregard that. He had -- he had an issue about that, whether he would be deported or not. And I think I might have told him, I might have said the same thing I've been telling him the whole time, we don't know what's really going to happen, we don't know what's going to really happen, but the government -- this government -- this U. S. Attorney is not seeking to deport him, but I can't tell him what's going to happen later.

Q. And based on your knowledge you didn't have any understanding or knowledge that deportation in [100] this case under the facts would be automatic?

A. I didn't know that the deportation would be automatic on this case, I didn't.

Q. Okay.

MR. WHITMORE: No further questions.

THE COURT: Thank you.

MR. WHITMORE: Thank you, Your Honor.

THE COURT: Mr. McNally, you may cross examine the witness.

MR. WHITMORE: Thank you, Your Honor.

Could I see exhibits one, three and four, please?

THE COURT: Yes, and you may approach.

MR. McNALLY: Thank you, Your Honor.

CROSS EXAMINATION

BY MR. McNALLY:

Q. Mr. Fitzgerald, the words that you just used was I can't tell him what is going to happen. And that kind of basically describes a lot of what was going on in the -- in the advice or lack of advice to Mr. Lee about deportation regarding ICE or INS, correct?

A. True.

Q. Okay. And, in fact, you answered the question that you were unfamiliar or you had no [101] awareness or knowledge that a guilty plea to 21 U.S.C. Section 841, parenthetical a, parenthetical one, which was the in this indictment, possession with the intent to distribute ecstasy would result in automatic deportation?

A. No, I didn't know with any degree of certainty.

Q. Okay. And certainly did not advise Mr. Lee that he would be deported if he entered a plea of guilty to that charge?

A. No.

Q. And, in fact, the advice that you gave him was that the United States Attorney's office in his case was not seeking deportation?

A. True.

Q. Okay. There's been reference several times to a letter that you wrote to Mr. Lee.

I'm going to hand you what's been identified and introduced as Exhibit 1.

MR. McNALLY: With the court's permission may I approach the witness?

THE COURT: You may, thank you.

MR. McNALLY: Thank you, Your Honor.

May I have that same permission with some of the other exhibits?

[102] THE COURT: You may -- you do.

MR. McNALLY: Thank you.

BY MR. McNALLY:

Q. Mr. Fitzgerald, do you -- can you identify exhibit -- what has been marked and introduced as Exhibit 1 to these proceedings?

A. Yes, the letter that I wrote on May 10th, 2010, sometime after the plea --

Q. Okay.

A. -- change of plea, yes.

Q. And that's the one that you were referring to before that you had written at the request of Mr. Lee, I believe, right?

A. Yes.

Q. All right. And that second sentence there, that is correct that the government was not seeking deportation in his case?

A. That's true.

Q. Okay. And that was always your understanding in this case?

A. Well, yes -- yes.

Q. Now you mentioned several times here that deportation was a big deal: I was trying to use your words here, that that was the main issue to Mr. Lee was, am I going to be deported, correct?

[103] A. True.

Q. Okay. And you did the best you could do in trying to give him the advice that you could give him --

A. Yes.

Q. -- at the time in 2009?

A. Yes.

Q. And, in fact, you said that your practice is primarily criminal defense?

A. That's true.

Q. You said that maybe 15 percent of it is some other law, correct?

A. That's true.

Q. You do not practice immigration law, right?

A. No.

Q. You don't have immigration clients where you are processing visas or permanent residency cards or anything like that?

A. No.

Q. And you are not litigating in the INS court here in Memphis to help people avoid deportation?

A. No.

Q. Okay. And you are not a member of any of the Federal Bar Association Immigration sections or anything like that, correct?

[104] A. No.

Q. Okay. Let's talk now about search warrants.

You've had approximately a hundred trials, and I understand, just like myself, if you had to ask me how many, it would be a ballpark estimate. I am sure that you have filed and litigated suppression motions, correct?

A. That's correct.

Q. Okay. And as you said, often you will read the affidavit in support of the search warrant and if it looks like it has the probable cause or what you are accustom to seeing, you don't waste a lot of time going too much further unless you, as I like to say, unless the dog smells a trail to hunt down, right?

A. That's true.

Q. Okay. But there have been times even when you read the affidavit and said I don't think we have a very good chance of prevailing on this motion to suppress evidence, but you filed one before, haven't you?

A. Sometimes.

Q. Okay. And there's been times that you actually went forward with the evidentiary hearing, right?

[105] A. True.

Q. And there's been occasions when -- I'm going to ask you, has there been some occasions where evidence occurred during that suppression hearing that actually helped support your position to suppress the evidence?

A. It's helped sometimes both ways.

Q. Correct.

And sometimes it gets worse?

A. Yes.

Q. But we don't know when we're making the decision whether to file the motion or not what may come out of the witness' mouth when they testify, correct?

A. That's correct.

Q. And there's been times when a witness may say things that are inconsistent with the -- that's sworn to in the affidavit, correct?

A. That's correct.

Q. And that improves your chances of prevailing on the search warrant?

A. That's true.

Q. And, in fact, if you had experiences much link my own, sometimes you develop things during the suppression hearing that actually make the decision [106] to go to trial a little bit better?

A. It may benefit you.

Q. Correct. You may --

A. But it may hurt you now, it could go either way.

Q. Correct, and absolutely, I've got the same experiences, it can sometimes help you or at the worse you are going to hear what's probably already written in the affidavit, correct?

A. Yes.

Q. All right. Which doesn't hurt you much worse than what you already knew in the affidavit to begin with in terms of making the decision to go to trial or not?

A. Yes.

Q. Okay. But as we both have just said, there are times when we file motions to suppress evidence that

things do -- that the case for the defense does improve?

A. True.

Q. And that isn't known ahead of time until you have the hearing?

A. True.

Q. Okay.

MR. McNALLY: Could I see Exhibit 5 again, [107] please.

BY MR. McNALLY:

Q. You were asked some questions about the proffer letter and the proffer made by Mr. Lee to the government, correct?

A. Yes.

Q. All right. And the questions were in a sense about, well, Mr. Lee made some admissions of selling some ecstasy and you answered that you remembered that?

A. Yes.

Q. Okay. Now have you had an opportunity to review the proffer letter that was -- that was signed in this case here on February 9th, 2010?

A. The one he just gave me, yes.

Q. Correct, okay.

A. Yes.

Q. And isn't it correct that in the proffer letter the statements made by the accused cannot be used by the government in their case-in-chief?

A. That's true.

Q. Bar none, it cannot be used in the case-in-chief?

A. It cannot be used unless he makes a statement that is contrary to that, yes.

[108] Q. Correct.

So if Mr. Lee and you had decided to go to trial because of deportation or because the case started looking a little better or because he just simply wasn't going to plead guilty, and he didn't testify, then statements made during the proffer could not be used against him?

A. They could not be used against him, that's correct.

Q. Correct.

So you could get up and try the case and hold the government to their burden of proof and then sit down and his statements during the proffer would never be used against him?

A. That's true.

Q. Okay. The decision to cooperate and give a proffer often is in conjunction with the decision to enter a plea of guilty, correct --

A. Yes.

Q. -- in federal court?

A. Yes.

Q. Okay. And, in fact, in order to get the safety valve benefit to get out from below a mandatory minimum or to get a reduced sentence, it requires being truthful to the government?

[109] A. Yes.

Q. Okay. And -- and often in an effort to get the safety valve for the defendant, the decision would be made to go and give a proffer, correct?

A. Yes.

Q. Okay. And in this case there was a decision made to do a guilty plea for Mr. Lee for a change of plea for Mr. Lee?

A. You mean prior to the proffer, I mean --

Q. No, just in this case there was a decision made to enter a plea of guilty?

A. At some point, yes.

Q. Okay. And that was weighing the risk of going to trial versus the benefits of pleading guilty?

A. True.

Q. In Mr. Lee's discussions with you, he understood that by pleading guilty he -- this government, the United States Attorneys office was not going to seek deportation?

A. Yes.

Q. And he thought he was going to get a lighter sentence, which I think he did based on what we've seen so far, is that correct?

A. He did.

[110] Q. Okay. So his belief was that he would serve his sentence, whether house arrest, split confinement or incarceration, and then he would be back working at his restaurants and living here in Memphis, Tennessee?

A. I think that is what he believed, yes.

Q. Okay. All right. And that was -- I mean, as you said, the big deal for him was not to be deported, correct?

A. That's true.

Q. Okay. Because most of all of his life has been in this country, right?

A. Yes.

Q. Okay.

MR. McNALLY: Your Honor, if I may approach the witness?

THE COURT: You may.

BY MR. McNALLY:

Q. I'm handing you what's been marked as Exhibit 4 and introduced as evidence in this case and it's entitled change of plea hearing.

A. Correct.

Q. And I've opened it up to page nine I believe or page ten.

There were some questions asked of you about [111] the colloquy between, the questions and answers between the judge and Mr. Lee.

And you said that at one point the judge asked, are you a U. S. citizen.

Do you remember that?

A. I do.

Q. Okay. And if you need to I've turned to the pages where I think this particular question has been answered are located at the bottom of page nine.

The judge asked him, are you a U. S. citizen. He said no, I'm not Your Honor.

And then the judge says, this charge could result in you being deported and it could also affect your ability to attain the status of a United States citizen.

That goes between nine and ten which at the very --

A. Yes.

Q. Okay. And in reading that and in hearing that it would -- would you not agree that the judge is basically saying you might be deported, you could be

deported or you might be able to stay here, and it might affect you being a citizen, correct?

A. Yes.

[112] Q. Okay. And, in fact, it goes on to say, does this affect your decision about whether you want to plead guilty or not. And Mr. Lee says, yes, Your Honor.

Correct?

A. Yes.

Q. And do you remember that happening in court?

A. I do.

Q. Okay. And if you are like me, you probably went, okay, let's see where we are going here now because he's saying that it does affect my decision, Your Honor; correct?

A. Yes, I remember that.

Q. All right. And then the judge says, how does it affect your decision? And Mr. Lee says, I don't understand.

Correct?

A. Yes.

Q. All right. At that point when he said I don't understand, did he start to talk to you or want to confer with you or anything in that --

A. He did, I think we took a second or two to confer.

Q. Okay. And then the judge comes back and says, well, knowing all of these things, do you [113] still want to go forward and plead guilty? And he says yes.

MR. WHITMORE: Your Honor, I'm going to object, that is a misrepresentation of the transcript. I mean, to the extent that not concerning what the

witness said, but Mr. McNally's characterization that then the judge took a break, and that's not in the transcript, so that characterization is a -- is a -- is a misstatement of fact.

THE COURT: Well, rephrase your question --

MR. McNALLY: Okay.

THE COURT: -- it may have been interpreted as this is what the transcript says.

BY MR. McNALLY:

Q. Mr. Fitzgerald, after Mr. Lee said I don't understand, what happened next during the change of plea hearing?

A. I think we talked for a few seconds.

Q. Okay. And by we, you mean you and Mr. Lee?

A. Mr. Lee and myself.

Q. Okay. Thank you on that part.

Mr. Fitzgerald, had you known that there was no question Mr. Lee was going to be deported at the [114] time the decision was being made to plead guilty or not, would you have proceeded to trial with Mr. Lee?

A. Yes.

Q. Why?

A. Well, in deciding whether I go to trial, I kind of determine what my client has to lose. If the state offered me anything where my client has nothing to lose, then I may as well try it, because if I try it, I may win. So -- I mean, sometimes I base on whether we go to trial based on what the client as well and I base on what does -- what does he have to lose. If he has nothing to lose, then I go to trial. Because I can't do any worse than what they have already done.

Q. And as you said, your decision to go to trial ultimately is based on what the client wants to do, right?

A. Yes.

Q. And in this case, if Mr. Lee had known that he would be deported for a plea of guilty to this indicted charge, do you believe he would have gone to trial?

A. Probably, yes.

Q. Okay.

MR. McNALLY: Thank you, sir.

[115] No other questions, appreciate it.

THE COURT: Thank you.

Any redirect, Mr. Whitmore?

MR. WHITMORE: Yes, Your Honor.

REDIRECT EXAMINATION

BY MR. WHITMORE:

Q. As it relates to the change of plea hearing, I mean, the -- the transcript, there is no pause between -- the transcript does not reflect a pause at all between Judge Donald's discussion with Mr. Lee to your knowledge?

A. No.

Q. Based on your experience and training, in light of the evidence that was against Mr. Lee, what is your -- what is the probability of -- of success, I mean, as a defense counsel you have to make an assessment whether or not your client would be successful or not, and that's part of your recommendation to the client, but what would been your assessment of him possibly prevailing in light of the evidence against him?

A. It probably was a losing proposition in someway. Of course, you know, as defense counsel, you have a lot of losing propositions that you end up coming out better than you think.

[116] Probably the best -- the best thing that could have come out of this was maybe a possession, that's it. I mean, I just -- I don't think there would be no way around the fact that he possessed the drugs, I mean, he possessed them, I don't know --

Q. And -- and we're talking about, also, the issue of -- I think Mr. McNally brought up the issue of the defendant not testifying.

What's key to your strategy is for Mr. Lee to be able to testify and said this is really for personal use, and the alternative to be able to say as well I'm not really distributing it, I'm giving it to people --

A. Well, that --

Q. -- so what if you can't get that information in now because you are not going to put him on the stand, so there is no chance of you getting any of that potentially mitigating evidence in, how would -- what -- how would that impact the probability?

A. Well, I think the probability would go down for us winning. If we couldn't get him to say anything, and there would be a problem if he got on the stand because that proffer letter would -- says [117] something totally different from what he's saying --

Q. Okay.

A. -- so it would just have to be strategy decision we would have to make and decide what we were going to do. The risk we would have to take I guess.

Q. And we also know that there were substantial benefits that he gained by pleading guilty, hypothetically speaking?

A. Yes.

Q. And, as a matter of fact, hypothetically speaking, if he would not -- not hypothetically speaking, he would have not received acceptance, right; the three points --

A. Three points, yes.

Q. -- acceptance if he decided to go to trial?

A. Yes.

Q. There's a likelihood he possibly would not have received the low end of the guideline as a result of going to trial?

A. Yes.

Q. Not only that, he probably would not have had the opportunity to provide a contrite, a humble statement to the court, like he did, confessing what he had done as being a mistake if he had gone to [118] trial, which, in fact, maybe would have impacted his sentence?

A. Yes. He would probably would have gotten -- let's put it that -- he probably would have gotten a greater sentence if that had been the case, probably.

Q. So what he was -- he was facing 24 to 36 months based on acceptance and the possibility of the low end of the guidelines; is that your understanding?

A. That -- that's true.

Q. And so, therefore, if we're not talking about acceptance, or the low -- nor the low end of the guidelines, we're talking now anywhere from three to five years; isn't that correct?

A. That's correct.

Q. And have you had clients in the end, regardless of what they initially said they would do, but once they thought about the time that they were would really have to spend in prison in the end made a decision to tell you to go ahead and resolve it to limit their -- their exposure?

A. Yes.

MR. McNALLY: Objection to what other clients may have done or not done and then move to [119] strike the answer.

THE COURT: Objection -- yes, I will let you be heard.

MR. WHITMORE: Your Honor, to the extent that, and this is not an issue that I'm saying that Mr. McNally did the same and I didn't object, but this is within the realm of strategy and the possibilities because I think -- I'm following his line of questioning that he asked him about the possibility as it relates to his clients, as it relates to the search warrant, the possibility, all of these issues he's opened the door to this type of dialogue. And I'm just trying to bring it in perspective and say there is also another side to what you said on cross-examination.

THE COURT: And that's certainly acceptable, I am still going to sustain his objection as to what other clients --

MR. WHITMORE: Okay.

THE COURT: -- have done --

MR. WHITMORE: Okay.

THE COURT: -- and so that answer --

MR. WHITMORE: Okay.

THE COURT: -- will be stricken.

[120] BY MR. WHITMORE:

Q. Well, is there a possibility, based on your dealing, that Mr. Lee could have changed his position and asked you to resolve the matter in the end?

A. I don't understand the question, I'm sorry. What -- what -- I'm sorry.

Q. No, no, it's the way -- I'm sure it's the way I'm forming it because I'm trying to regroup now.

Let me -- let me also ask you -- let me switch gears here.

Did you perform a thorough analysis of the search warrant to assess whether or not there's a probability of success?

A. Yes. You look at the search warrant, you look at the affidavit, you look at everything that goes with it. If you have a problem, then you file a motion to suppress, that's what you do.

If you don't have a problem, you don't. If the affidavit is sufficient and the search warrant looks, you don't. But sometimes you will file one, more so in state court than federal court, you will file one for various reasons.

I mean a motion to suppress, I'm sorry, I said file one.

[121] Q. And -- and with a search warrant you also have the, not only the -- the -- the officer providing -- the affiant providing the facts for the search warrant, but you do have the magistrate or the judge really serving as the gatekeeper as well whether or not the search warrant is valid?

A. He has to sign it, yes. He or she.

Q. And have you ever dealt with a search warrant before signed by Judge Pham?

A. No, I don't think so.

Q. Do you have any reason to think that he would have lightly assessed the -- the probable cause as it relates in his search warrant?

A. Well, who signs it doesn't matter -- doesn't matter me, I mean --

Q. Okay.

A. -- when it comes down, I don't care who signs it. If I think it's improper, then I do what it takes. I mean, I think the judge can on what the facts that he is given as far as the search warrant is concerned. But if I look at it, regardless of whether the judge signed it or not, if it doesn't look proper, then I do something, you know, I take some type of action.

[122] Q. But you were saying as a defense counsel just because you are going to trial, you don't have to file a motion to suppress when you -- when you believe that the warrant as sufficient, you can --

A. No.

Q. -- not attack the search warrant but still go to trial?

A. Yes.

Q. Okay. And, as a matter of fact, our proffer sessions in the U. S. Attorney's office, you can have a proffer session with the U. S. Attorney and still go to trial as well?

A. You can.

Q. Has the fact that the U. S. Supreme Court case, I think the case is *Padilla* has -- has established a bright line as it relates to these types of issues, will

you now handle your practice differently in light of this current Supreme Court case?

A. I would make them sign something saying that they, I mean, you just give them a letter --

Q. Right.

A. -- and have them sign it, a statement, have them sign it.

Q. Prior to this particular case, did you have [123] any reason to do anything like that?

A. Not to have them sign anything, no.

Q. Did you have any reason, prior to that Supreme Court case, to be concerned about this particular issue as it has been raised now?

A. Deportation, yes. I just -- I have done a case like maybe a year before that, and they didn't deport my client, I mean, it was a felon, they didn't deport him for whatever reason.

Q. And are you making a dichotomy or a distinction between the U. S. Attorneys' office and what the agency immigration can do?

A. That's totally two totally different agencies.

Q. So you see that the U. S. Attorney's office dealing with this in a judicial setting is where your responsibility lies and to the extent what immigration may do to his case, your -- your advise was I can not say what immigration may ultimately do; was that your advice?

A. That's true.

Q. Okay.

MR. WHITMORE: I have no further questions, Your Honor.

THE COURT: All right. I will allow [124] limited recross if you want any. I usually don't, but there were a number of other areas gone into.

RECROSS EXAMINATION

BY MR. McNALLY:

Q. Mr. Fitzgerald, let's get to the bottom line of your representation with Mr. Lee and the decision --

A. Yes.

Q. -- to plead guilty or not.

If me had been offered three years and reliable assurances that he would not be deported, would he have taken that?

A. He would have.

Q. Okay. The key to his decision to plead guilty or not guilty was about not being deported?

A. That's correct.

Q. Okay. If he thought there was -- if he knew that he would be deported upon a plea of guilty to the indicted charge, would he have taken the chance of going to trial?

A. I would have advised him to.

Q. Put on the possibility he might be found guilty of simple possession or not guilty if the government didn't meet its burden?

A. Yes.

[125] Q. Okay.

MR. McNALLY: Thank you, sir, that is all I need to ask.

THE COURT: All right. Thank you, Mr. Fitzgerald, you may step down.

THE WITNESS: Thank you, Your Honor.

THE COURT: Thank you for being here today.

MR. WHITMORE: No further evidence, Your Honor.

THE COURT: And if you'll pass that transcript there.

Thank you.

(Witness excused.)

THE COURT: Do you have any other witnesses?

MR. WHITMORE: No further evidence, thank you, Your Honor.

THE COURT: Any rebuttal proof?

MR. McNALLY: No, Your Honor.

THE COURT: All right. Counselors, how do you want to proceed in closing arguments?

Do you want to make them here today?

Do you want to -- is Mr. Fitzgerald needed any further?

[126] MR. WHITMORE: No, Your Honor.

THE COURT: Uh-huh. You are excused, thank.

THE WITNESS: Did I leave my glasses?

THE COURT: Did you leave your glasses up here?

All right. If we find a pair, we will make a note that they are yours.

If you -- do want to make closing arguments today, we can take a lunch break, come back, we can go ahead and do them right now or I'm going to Mr. McNally the opportunity to submit written briefs if he wants to. I know that you have not submitted a written brief in the case. Mr. Lee has filed, I guess,

his motion and his reply pro se, although I must say he did an excellent job in them.

What's your position?

MR. McNALLY: If it pleases the court and I think my learned counsel would disagree with me probably because I'm making more work, but given the -- in light of the cases that are coming out in 2011, I would like to submit a written brief particularly on two of the issues.

One is, what does *Padilla* really require of counsel? Is it enough to say that you could be [127] or does it really require that you give succinct and straightforward advice, particularly if the consequences are automatic deportation.

I'm sure the court can gather from what I'm looking at that I think I know the position that the Sixth Circuit has taken.

And then the second I think would be on the retroactivity, I think it would help the court if I could actually identify the cases in a written brief as to where they are, and candidly they are all over the place.

THE COURT: Right.

I think it would be helpful to the court, I know the briefs don't address some of the more recent decisions in this area. And rather than us do the research, it would be helpful if you do the research and provide it to us.

Mr. Whitmore.

MR. WHITMORE: Well, Your Honor, on the issue of whether the attorney should say, I think *Padilla* is clear and I was going to point to the case where it uses the term eligible, possible, risk, there's

nothing in the case. And the defendant was in the same situation the court said all you need to do is -- is state that the person [128] may be eligible because we are not going to really put all of this responsibility on the defense counsel.

So from that standpoint point I think the government's brief kind of speaks to itself as it relates to addressing those issues.

But if Mr. McNally wants to reply and I would ask Your Honor, may I be given the opportunity to respond because I, too, looked at the cases late last night and there's not a lot out there, still not a lot of guidance. I was hoping that in fact, at least the Kentucky part of it, because I really believe, Your Honor, the most concerned part, even if the government were to concede the first part.

THE COURT: Right, the first part.

MR. WHITMORE: I still believe, and I'm having a hard time addressing this particular issue, is the outcome described in *Stickland* as relates to facts likes this, is it that he would have gone to trial or would the facts, the conviction have been the same. And that's the reason you see me try to get into the evidentiary issues because I'm not for sure where the court is leading, even though they mentioned a case dealing with parole elgibility.

So if the court wants to kind of bypass [129] the oral argument part or do a hybrid, we still do the oral argument and still file the brief, it doesn't matter to me. I don't know what we have to say would be helpful to the court anyway without it being in writing.

THE COURT: I mean, I'm -- I would be glad to entertain oral argument, but I do on some reflection think that the written briefs would --

MR. WHITMORE: Absolutely.

THE COURT: -- be helpful and the additional research.

I would tell you, the retroactivity issue I've not confronted before, but it is somewhat troubling to me because obviously Mr. Padilla in this Supreme Court case pled guilty prior to the time that Mr. Lee pled guilty, and the Supreme Court comes back and says and reverses the, as I read -- I just skimmed through it myself, but reverses that conviction or sends it back down.

It wouldn't make any sense to me that Mr. Lee during that same timeframe wouldn't be entitled to that same type of advice that Mr. Padilla was. Then I guess it becomes a factual question. So I'm a little puzzled on the retroactivity issue.

[130] Let's set a briefing schedule, and then we will decide about whether you want to proceed with oral argument.

First, as to a written brief, Mr. McNally how long would you need or how much time do you request.

MR. McNALLY: Could I have 21 days, Your Honor?

THE COURT: I have no problem with that.

And let's see, that would be three weeks from today, today is Thursday the 9th. So we will put it due, that would be -- let's do it Friday, March 2nd.

And, Mr. Whitmore, do you want the same amount of time to respond or how much time do you ask for?

MR. WHITMORE: That would be -- that would be fine, Your Honor, thank you. Because I have military duty along this period of time where I'm going to be out of town for about a week, so that would -- that would cover that time and allow me --

THE COURT: So that would put yours due Friday, March 23rd.

Now do you want to make any oral arguments today?

[131] You are not required to do so, you can make them in the written briefs.

If so, do you want to do them now or take a lunch break and come back.

MR. McNALLY: Your Honor, I will waive oral argument. I think we have kind of identified some of the issues that we are interested in and Your Honor has identified the one about the retroactivity in light of Padilla's situation.

The only request I have is there anything else that the court is particularly interested in the legal issues being briefed or factual issues?

THE COURT: The same thing that Mr. Whitmore brought up, which is really the second prong in the prejudice is the test of whether he would have not entered a guilty plea but gone to trial, or whether he would -- he would have prevailed at trial. How far do we have to go to determine prejudice.

MR. McNALLY: Or exactly what they mean by prejudice --

THE COURT: Right.

MR. McNALLY: -- in light of the --

THE COURT: Right.

Now I understand Mr. Whitmore's questions [132] to Mr. Fitzgerald, if Mr. Lee couldn't testify, then would that reduce his chances. But then again I look at it it's very possible as well if Mr. Lee had known it was automatic deportation, then he may not have agreed to enter a guilty plea which then he may not have agreed to a proffer and then you wouldn't have had the proffer, then he could have taken the stand. So I'm not sure how that plays out as well.

All right. Counselors, I appreciate your hard work on this case and your excellent job this morning.

As I said, the briefs thus far have been excellent. I think neither one of you have filed any of the briefs, so I will give you an opportunity to the put in your opinion on this case.

MR. WHITMORE: Thank you, Your Honor.

MR. McNALLY: Thank you, Judge.

THE COURT: That's all.

The court will stand in recess.

We could have that one document that was for identification only, I don't think we need to keep that.

MR. WHITMORE: No, Your Honor.

Thank you very much.

(Adjournment at 12:48 p.m.)

[133] **CERTIFICATE**

I, Lynn Dudley, do hereby certify that the foregoing 132 pages are, to the best of my knowledge, skill and ability, a true and accurate transcript from my stenotype notes of the evidentiary hearing on February 9, 2012, in the matter of:

JAE LEE

vs.

UNITED STATES OF AMERICA

Dated this 23rd day of May 2013.

Lynn Dudley
Official Court Reporter
United States District Court
Western District of Tennessee

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF TENNESSEE WESTERN DIVISION

JAE LEE, Movant, v. UNITED STATES OF AMERICA, Respondent.	Case No. 2:10-cv-02698-JTF-dkv Case No. 2:09-cr-20011-BBD

JUDGMENT IN A CIVIL CASE

DECISION BY COURT. This action came for consideration before the Court. The issues have been considered and a decision has been rendered.

IT IS SO ORDERED AND ADJUDGED that in accordance with the Order Adopting in Part and Rejecting in Part Magistrate's Report and Recommendation, Denying Motion to Pursuant to 28 U.S.C. § 2255, and Granting a Limited Certificate of Appealability, filed on March 20, 2014, this matter is hereby dismissed. Judgment entered in favor of Respondent.

APPROVED:

s/John T. Fowlkes, Jr.
JOHN T. FOWLKES, JR.
United States District Judge

March 20, 2014
Date

s/Thomas M. Gould
Clerk of Court

s/ Erica M. Evans
(By) Law Clerk

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF TENNESSEE WESTERN DIVISION

JAE LEE,	§	
Petitioner,	§	**Case No. 2:10-cv-02698-JTF-dkv**
v.	§	
UNITED STATES OF AMERICA,	§	**Case No. 2:09-c4-20011-BBD**
Respondent.	§	

NOTICE OF APPEAL

Notice is hereby given that the Petitioner, Jae Lee, in the above-styled case, hereby appeals to the United States Court of Appeals for the Sixth Circuit from the judgment and conviction entered in this action on March 20, 2014.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Notice of Appeal has been sent via the Court's electronic filing system to Mr. Kevin P. Whitmore, U.S. Attorney, Federal Bldg., 167 N. Main Street, Suite 800, Memphis, Tennessee 38103,on this the 31st day of March, 2014.

/s/Patrick T. McNally
PATRICK T. MCNALLY

RECORD
AND
BRIEFS

NO. 16-327

IN THE

Supreme Court of the United States

JAE LEE, *Petitioner*,

v.

UNITED STATES OF AMERICA, *Respondent*.

On Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

BRIEF FOR THE PETITIONER

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QUESTION PRESENTED

In the context of a noncitizen defendant with longtime legal resident status and extended familial and business ties to the United States, whether it is always irrational for a defendant to reject a plea offer notwithstanding strong evidence of guilt when the plea would result in mandatory and permanent deportation.

PARTIES TO THE PROCEEDING

There are no parties to the proceedings other than those listed in the caption. Petitioner is Mr. Jae Lee. Respondent is the United States of America.

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

PARTIES TO THE PROCEEDING ii

TABLE OF AUTHORITIES iv

OPINIONS BELOW 1

JURISDICTION 1

CONSTITUTIONAL PROVISION INVOLVED 1

INTRODUCTION 2

STATEMENT OF THE CASE 5

SUMMARY OF THE ARGUMENT 15

ARGUMENT 16

I. A defendant facing strong evidence of guilt can rationally reject a plea offer because of the plea's immigration consequences 16

A. A defendant can reject the government's plea offer rationally expecting to negotiate a plea that will not result in deportation 19

B. A defendant can also rationally reject a plea and take his chances at trial 25

II. Mr. Lee was prejudiced because he would have reasonably rejected the plea, if he had been properly advised of the deportation consequences 29

CONCLUSION 37

TABLE OF AUTHORITIES

Page(s)

Cases

Borrome v. *Attorney General of the U.S.*,
687 F.3d 150 (3d Cir. 2012) 22

Carachuri-Rosendo v. *Holder*,
560 U.S. 563 (2010) 20, 21

Chaidez v. *United States*,
133 S. Ct. 1103 (2013) 11, 27

DeBartolo v. *United States*,
790 F.3d 775 (7th Cir. 2015) ..... passim

Gonzales v. *United States*,
722 F.3d 118 (2d Cir. 2013) 18

Hill v. *Lockhart*,
474 U.S. 52 (1985) 15, 16, 17, 18

In re Batista-Hernandez,
21 I&N Dec. 955 (BIA 1997) 32

In re Espinoza,
22 I&N Dec. 889 (BIA 1999) 33

In re Michel,
21 I&N Dec. 1101 (BIA 1998) 22

In re Robles-Urrea,
24 I&N Dec. 22 (BIA 2006) 33

In re Velasco,
16 I&N Dec. 281 (BIA 1977) 32

INS v. *St. Cyr*,
533 U.S. 289 (2001) 15, 18, 28

TABLE OF AUTHORITIES—Continued

Page(s)

Lopez v. *Gonzales*,
549 U.S. 47 (2006) 11, 21, 22

Massachusetts v. *Lavrinenko*,
38 N.E.3d 278 (Mass. 2015) 19

Missouri v. *Frye*,
132 S. Ct. 1399 (2012) 16

Padilla v. *Kentucky*,
381 S.W.3d 322 (Ky. Ct. App. 2012) 26

Padilla v. *Kentucky*,
559 U.S. 356 (2010) ..... passim

People v. *Bautista*,
8 Cal. Rptr. 3d 862 (Cal. Ct. App. 2004) 20, 24

Pilla v. *United States*,
668 F.3d 368 (6th Cir. 2012) 14

Premo v. *Moore*,
131 S. Ct. 733 (2011) 29

Roe v. *Flores-Ortega*,
528 U.S. 470 (2000) 24

State v. *Sandoval*,
249 P.3d 1015 (Wash. 2011) 26

Strickland v. *Washington*,
466 U.S. 668 (1984) ..... passim

Torres v. *Lynch*,
136 S. Ct. 1619 (2016) 20

United States v. *Enquist*,
745 F. Supp. 541 (N.D. Ind. 1990) 25

TABLE OF AUTHORITIES—Continued

Page(s)

United States v. *Navarete-Bravo*,
No. 3:14-cr-001 (M.D. Tenn.) 33

United States v. *Orocio*,
645 F.3d 630 (3d Cir. 2011) 27, 30

United States v. *Rodriguez-Vega*,
797 F.3d 781 (9th Cir. 2015) 18, 24

United States v. *Scott*,
394 F.3d 111 (2d Cir. 2005) 34

Statutes

8 U.S.C. § 1101 ..... passim

8 U.S.C. § 1182 ..... 2, 6, 20, 22

8 U.S.C. § 1227 ..... 2, 6, 33

8 U.S.C. § 1229 11

8 U.S.C. § 1229b 20, 21

18 U.S.C. § 3 32

18 U.S.C. § 4 32

18 U.S.C. § 844 21

18 U.S.C. § 3607 32

21 U.S.C. § 331 ..... 22, 32

21 U.S.C. § 353 ..... 22, 32

21 U.S.C. § 841 ..... 2, 6

21 U.S.C. § 844 31

26 U.S.C. § 7203 22

26 U.S.C. § 7204 22

TABLE OF AUTHORITIES—Continued

Page(s)

26 U.S.C. § 7205 22

28 U.S.C. § 1254 1

28 U.S.C. § 1291 1

28 U.S.C. § 1331 1

28 U.S.C. § 2255 ..... 11, 14

Cal. Pen. C. 1016.2 23

Cal. Pen. C. 1016.3 23

Other Authorities

Jenny Roberts, *Proving Prejudice, Post-Padilla*, 54 How. L.J. 693 (2011) 29

U.S. Const. amend. VI 1

U.S. Dep't of Justice, *United States Attorneys Manual, Criminal Resources Manual*, § 712, Pretrial Diversion 20

U.S. Dep't of Justice, *United States Attorneys Manual, Principles of Federal Prosecution*, § 9-27.420(A) (1997) 23

OPINIONS BELOW

The United States Court of Appeals for the Sixth Circuit's opinion, Pet. App. 1a–10a, is reported at 825 F.3d 311. The United States District Court for the Western District of Tennessee's opinion, Pet. App. 11a–50a, is not reported but is available at 2014 WL 1260388. The Report and Recommendation of the Magistrate, Pet. App. 51a–77a, is not reported but is available at 2013 WL 8116841.

JURISDICTION

The district court had federal-question jurisdiction under 28 U.S.C. § 1331, and the court of appeals had jurisdiction under 28 U.S.C. § 1291. The court of appeals filed its opinion on June 8, 2016. Pet. App. 1a. Mr. Jae Lee filed a petition for certiorari on September 6, 2016, and the Court granted the petition on December 14, 2016. The Court's jurisdiction rests on 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

The Sixth Amendment to the United States Constitution provides in relevant part:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury . . . [and] to have the Assistance of Counsel for his defence.

INTRODUCTION

A defendant demonstrates *Strickland* prejudice when the objective evidence establishes that it would be rational under the circumstances for him to reject a plea offer. For some defendants, a plea's deportation consequences are so severe that it is rational to reject the plea and pursue a better bargain or trial, no matter the strength of the prosecution's evidence. The Sixth Circuit was wrong to hold categorically that "no rational defendant charged with a deportable offense and facing 'overwhelming evidence' of guilt would proceed to trial." Pet. App. 4a, 10a.

Petitioner Jae Lee has been a legal resident of the United States since moving from South Korea with his parents in 1982. Mr. Lee has never returned to Korea. At an early age, Mr. Lee left his family home in Brooklyn to assist an aunt with her restaurant in the Memphis area. He built on that experience to become a successful business owner, opening and operating two restaurants in the Memphis area. Regrettably, he also started using ecstasy at parties and was charged with possession of ecstasy with intent to distribute under 21 U.S.C. § 841(a)(1).

In 2009, Mr. Lee pled guilty to possession of ecstasy with intent to distribute and received a sentence of a year and a day, a reduction from the 24- to 30-month Guidelines range. Mr. Lee's trial counsel assured him that the plea would not result in deportation. If only that was so. Lee's plea offense results in mandatory deportation and permanent exile from the United States. See 8 U.S.C. §§ 1101(a)(43)(B), 1227(a)(2)(A)(iii); 1182(a)(9)(A)(i). The government concedes that Mr. Lee's trial counsel provided ineffective assistance.

The government now insists that Mr. Lee cannot demonstrate prejudice under *Strickland* v. *Washington*, 466 U.S. 668, 687 (1984), because, the government says, there is strong evidence of Mr. Lee's guilt. In the government's view, a rational defendant never considers a plea's consequences, only the quality of the evidence arrayed against him. Not so. Consider a defendant whose counsel incorrectly advised him that a plea would avoid imposition of the death penalty, when in fact the exact opposite was true. No matter how overwhelming the evidence of guilt, it would still be rational for the defendant to withdraw the plea and take his chances at trial because the consequences are so severe. Defendants consider a multitude of factors when deciding whether to reject a plea. The strength of the government's evidence is just one factor.

For a long-term, permanent resident, remaining "in the United States may be more important . . . than any potential jail sentence." *Padilla* v. *Kentucky*, 559 U.S. 356, 368 (2010) (quotation omitted). For some immigrants, deportation may result in death. For others, the prospect of permanent exile is so distressing that they would risk trial, whatever the odds. And in either situation, a properly counseled defendant would bargain for a non-deportable plea offense, or at least plea to avoid mandatory deportation.

If Mr. Lee's lawyer had provided constitutionally adequate advice about the immigration consequences of the plea, Mr. Lee could have sought an alternative plea, even one involving a more serious offense that risked a lengthier prison sentence—that protected Mr. Lee's immigration status. Mr. Lee also could have sought a plea that left him free to pursue relief

from removal based on the considerable equities in his case. Alternatively, Mr. Lee could have required the government to carry its burden of proof beyond a reasonable doubt at trial. But his lawyer's ineffectiveness prejudicially deprived Mr. Lee of all these opportunities.

Objective evidence shows that Mr. Lee would not have pled guilty had he been properly advised. His attorney indicated that deportation was Mr. Lee's "main concern," Pet. App. 54a, and that Mr. Lee would have chosen trial had he known his plea equaled deportation, Pet. App. 56a. As the Magistrate Judge who conducted the § 2255 evidentiary hearing found, "it would have been rational for [Mr. Lee] to choose to go to trial, whatever the likelihood of success . . . because under the circumstances, deportation was, objectively, at least as undesirable as any prison sentence." Pet. App. 76a.

Mr. Lee has willingly spent more than seven years in detention awaiting the outcome of this litigation, rather than allowing himself to be deported immediately after serving his one-year sentence. This fact alone is strong objective evidence that avoiding deportation is of greater importance to Mr. Lee than the possibility of serving a significantly longer prison sentence.

The court of appeals should be reversed, and Mr. Lee's § 2255 petition should be granted.

STATEMENT OF THE CASE

A. Mr. Jae Lee

Petitioner Jae Lee is a lawful permanent resident of the United States. J.A. 161–62. He and his parents arrived in the United States in 1982, when Jae Lee was 13 years old, and he has never returned to his birth country of South Korea. J.A. 130, 161. Jae Lee's parents became naturalized citizens of the United States. J.A. 163. They are elderly, and Jae Lee has historically taken care of them. J.A. 171.

Jae Lee's parents settled in Brooklyn, New York, and opened a coffee shop in upper Manhattan. J.A. 161. Jae Lee was educated in United States public schools, graduating from a business high school in New York City. J.A. 161–62.

In 1987, Jae Lee moved to Memphis, Tennessee, and worked in a restaurant for several years. J.A. 161. With his parents' help, Jae Lee then opened his own restaurant in Bartlett, Tennessee, the Mandarin Palace Chinese Restaurant. J.A. 161, 163. After 14 successful years with the Mandarin, Mr. Lee opened a second restaurant in Memphis, Tennessee, and made arrangements to continue operating both businesses, even while being held in detention. J.A. 44, 161, 163.

Mr. Lee has now been held in detention for more than seven years awaiting the outcome of this litigation, far longer than his exposure had he gone to trial.

B. The indictment

Although a successful entrepreneur with no previous criminal convictions, Mr. Lee used ecstasy, a recreational drug. Acting on a tip, law enforcement officers executed a search warrant at Mr. Lee's home on January 6, 2009, and reported finding 88 ecstasy pills, three valium pills, and a firearm. J.A. 83. Mr. Lee was charged with possessing ecstasy with the intent to distribute in violation of 21 U.S.C. § 841(a). J.A. 5. Conviction of this charge is an "aggravated felony" that results in mandatory, permanent deportation for the defendant. 8 U.S.C. §§ 1101(a)(43)(B), 1227(a)(2)(A)(iii); 1182(a)(9)(A)(i). Mere possession of ecstasy is a misdemeanor under federal law, not an aggravated felony, and thus does not result in mandatory deportation.

C. Mr. Lee's defense counsel

Jae Lee retained Larry Fitzgerald to represent him on the federal indictment. J.A. 166. Mr. Lee told Mr. Fitzgerald that he was a citizen of South Korea and a lawful resident alien in the United States. J.A. 162, 167–68, 219. Mr. Lee further advised Mr. Fitzgerald that he had never returned to South Korea since arriving in this country. J.A. 130–31.

Unfortunately, Mr. Fitzgerald had no expertise or experience in immigration law. J.A. 228. And he had not represented immigration clients at the time he represented Mr. Lee, nor did he later acquire any up to the hearing on Mr. Lee's § 2255 petition. J.A. 228. Mr. Fitzgerald did not know that a conviction for possession with the intent to distribute ecstasy would result in mandatory deportation. J.A. 226. And Mr. Fitzgerald did not seek the assistance of an immigration attorney when representing Mr. Lee.

J.A. 158; Pet. App. 54a–55a. In Mr. Fitzgerald's discussions with Mr. Lee, Lee "repeatedly" asked whether he would be deported and indicated that avoiding deportation "was his *main concern*." Pet. App. 54a (emphasis added). But Mr. Fitzgerald never attempted to negotiate an alternative disposition that avoids mandatory deportation at the very least, because, as discussed below, he erroneously thought he had already done so.

In February 2009, less than one month after Mr. Lee was indicted, Mr. Lee participated in a proffer session with the government. Pet. App. 55a. In exchange for a guilty plea to possession with intent to distribute, the government agreed to deduct three points for acceptance of responsibility, reducing Mr. Lee's offense level to 17. *Ibid.* (Mr. Fitzgerald told Mr. Lee that this reduction made Lee eligible for the statutory safety valve, which was also incorrect. J.A. 133, 202.) Mr. Fitzgerald told Mr. Lee he would likely face a 3- to 5-year prison sentence if he went to trial, while the plea would result in a much shorter term or possibly even probation. Pet. App. 55a. Mr. Fitzgerald also told Mr. Lee that the government was not seeking to deport Lee as part of the proposed plea agreement. *Ibid.* As Mr. Lee averred, Mr. Fitzgerald told him that Lee's "30+ years of living in the U.S. and strong ties, in combination with a lack of prior criminal history and the small amount of drugs involved," made it "impossible for the Government to deport" Mr. Lee, "even if they had wanted to." J.A. 131. Conversely, Mr. Fitzgerald advised, if Mr. Lee pursued his constitutional right to a jury trial, the government would initiate deportation proceedings if a conviction occurred. J.A. 168.

A few days before the plea change, Mr. Lee recalls, Mr. Fitzgerald told him that the non-inclusion of any deportation terms in the "binding" plea agreement "fully protected" Lee. J.A. 132. It was only because of this advice that Mr. Lee accepted the deal and pled guilty on June 17, 2009. Pet. App. 56a; J.A. 132. Mr. Fitzgerald later testified that Mr. Lee's belief that he would not be deported was "the key to [Lee's] decision." Pet. App. 56a. Mr. Fitzgerald also testified that if Mr. Lee had known a guilty plea would result in deportation, Lee would have chosen to proceed to trial, and Mr. Fitzgerald would have advised him to do so. *Ibid.*; J.A. 244. Mr. Lee testified that he would absolutely have accepted the risk of going to trial if he had known a plea would result in his deportation. Pet. App. 56a.

At the change-of-plea hearing, the court informed Mr. Lee that deportation and ineligibility for citizenship were potential consequences of his guilty plea, and the court asked Mr. Lee if those consequences affected his decision to plead guilty. Pet. App. 57a. Mr. Lee said "Yes, Your Honor," J.A. 103, then answered "I don't understand" when asked how these consequences affected his decision. *Ibid.* As explained further below, Mr. Fitzgerald assured Mr. Lee that despite the Court's inquiry, Mr. Lee would not be deported. J.A. 132–33, 210–11; see J.A. 235. On September 28, 2009, Mr. Lee was sentenced to a period of confinement of a year and a day. Pet. App. 57a.

Mr. Lee soon learned that the correctional facility where he was confined "exclusively housed federal inmates" facing deportation after completing their sentences. Pet. App. 58a. Shortly thereafter, Mr. Lee's case manager told him that his conviction rendered him deportable, and that removal proceedings were imminent. *Ibid.* Mr. Lee immediately contacted Mr. Fitzgerald, who told Lee that Lee was mistaken and that he was not going to be deported. J.A. 137. Prison staff re-confirmed that it was Mr. Fitzgerald who was mistaken. *Ibid.* Mr. Lee requested pleadings and a letter from Mr. Fitzgerald, which Mr. Fitzgerald took several months to provide. *Ibid.* Mr. Fitzgerald wrote a "To Whom It May Concern" letter, noting that there "was never any discussion of deportation during the negotiation of the Plea Agreement or during the Sentencing." J.A. 129. It was Mr. Fitzgerald's understanding "that the Government was not seeking Deportation of Mr. Jae Lee." *Ibid.* On September 24, 2010, Mr. Lee filed *pro se* his motion for habeas relief under 28 U.S.C. § 2255, claiming ineffective assistance of counsel. Pet. App. 58a–59a.

D. The evidentiary hearing

Mr. Lee waited sixteen months—longer than his yearlong sentence—for an evidentiary hearing. At the hearing, Mr. Lee testified that Mr. Fitzgerald affirmatively advised him regarding the plea: "You have been in the United States so long they cannot deport you. Even if they want to deport you, it's not in the plea agreement, the government cannot deport you." Pet. App. 56a. In fact, Mr. Fitzgerald grew irritated with Mr. Lee for bringing up the deportation issue so often:

> Every time I ask him about that because, you know, I was worried about the deportation, my immigration status. and he always said why you are worrying about something that you don't need to worry about, you have been in the United States so long they cannot deport you. Even if they want to deport you, it's not in the plea agreement, the government cannot deport you. So he was like, one point he was pretty upset because every time something comes up I always ask about immigration status. [J.A. 170.]

As the Magistrate Judge found in her Report and Recommendation, the "testimonies of Lee and Fitzgerald were consistent that deportation was the determinative issue in Lee's decision whether to accept the plea deal." Pet. App. 56a. Regarding the plea colloquy, where Mr. Lee said "I don't understand" in response to the court's question about deportation, Mr. Lee testified that he looked to Mr. Fitzgerald for guidance. Fitzgerald assured Lee that he could disregard the deportation warning because it was only a "standard warning for non-U.S. citizen[s]." Pet. App. 57a; J.A. 132–33, 210–11.

Regarding the merits of the case against Mr. Lee, Mr. Fitzgerald thought that it was a "bad case to try," because he had not identified a basis to attack the search of Mr. Lee's home, and he believed that the number of pills and other evidence weakened a defense that the ecstasy was for Mr. Lee's personal use rather than distribution. Pet. App. 54a. Mr. Fitzgerald thought that going to trial would have been a losing proposition because "the best thing that could have come out of this was maybe a possession, that's it." J.A. 238. Mr. Fitzgerald was apparently

unaware that a simple possession conviction would have avoided the permanent deportation consequences of an aggravated-felony conviction. When Mr. Lee pled guilty in 2009, first-time possession of any controlled substance other than Flunitrazepam (the date-rape drug) or more than five grams of crack cocaine would have allowed Mr. Lee to be eligible for cancellation of his deportation. See *Lopez* v. *Gonzales*, 549 U.S. 47, 54 & n.4 (2006); 8 U.S.C. § 1229b(a).

E. Post-hearing proceedings

In a post-hearing brief, the government conceded that Mr. Lee's counsel was ineffective and that Mr. Lee was prejudiced by the deficiency. R. 40, Resp. of the U.S. to Pet'r's Post Hr'g Br. in Supp. of Mot. Pursuant to 28 U.S.C. § 2255, pp. 2–3. Nonetheless, said the government, Mr. Lee was not entitled to relief because *Padilla* did not apply retroactively, *ibid.*, a question that had divided the circuits. Proceedings were stayed when this Court granted certiorari to answer that question. A year later, this Court held in *Chaidez* v. *United States*, 133 S. Ct. 1103 (2013), that *Padilla* did not apply retroactively to cases that were on collateral review at the time of the decision. Because pre-*Padilla* Sixth Circuit precedent recognized an independent claim for gross misadvice concerning a conviction's consequences, Pet. App. 30a–31a, 68a–72a, this case proceeded on the separate question the Court did not address in *Padilla* v. *Kentucky*, 559 U.S. 356, 360 (2010), when a defendant facing deportation can demonstrate *Strickland* prejudice.

In the district court, the Magistrate Judge concluded that Mr. Lee satisfied the deficient-performance prong because Mr. Fitzgerald "affirmatively misadvised Lee as to the immigration consequences of pleading guilty to the drug-trafficking crime for which Lee was indicted." Pet. App. 73a. As to prejudice, Mr. Lee contended that "his life-bonding ties are in the United States," and he "had nothing to lose by going to trial if the alternative was to be deported," because he no longer had any connection to South Korea. Pet. App. 75a. But the government argued that going to trial would not have been rational given the evidence of Mr. Lee's guilt, which the government believed was overwhelming.

The Magistrate Judge acknowledged that the prejudice test is objective, not subjective, and that "a prediction of the likely outcome at trial is frequently dispositive of the inquiry." Pet. App. 75a (citation omitted). But the Magistrate Judge concluded that Mr. Lee had established prejudice because if he had known that a plea would result in mandatory deportation, "*it would have been rational for him to choose to go to trial*, whatever the likelihood of success and even though he might face one to five years greater a sentence than if he had pled guilty, because under the circumstances, deportation was, objectively, at least as undesirable as any prison sentence." Pet. App. 76a (emphasis added). The Magistrate Judge recommended setting aside Mr. Lee's guilty plea and vacating his conviction. *Ibid.*

The district court adopted and rejected in part the Report and Recommendation and denied Mr. Lee's § 2255 motion. The court said that although the Report and Recommendation purported to apply an

objective standard, its prejudice analysis, focusing on Mr. Lee's desire to avoid deportation, was subjective. "The proper focus under an objective standard," wrote the district court, "is on whether a reasonable defendant in Lee's situation would have accepted the plea offer and changed his plea to guilty." Pet. App. 46a. "In light of the overwhelming evidence of Lee's guilt, a decision to take the case to trial would have almost certainly resulted in a guilty verdict, a significantly longer prison sentence, and subsequent deportation." *Ibid.* The district court certified the issue for appeal.

The Sixth Circuit affirmed. It began its analysis by noting Mr. Fitzgerald's erroneous advice and the government's concession that Mr. Lee satisfied the deficient-performance prong of the *Strickland* test. Pet. App. 2a–3a. Turning to the prejudice test, the court noted that whether Mr. Lee satisfied the standard was "not immediately obvious," Pet. App. 3a, because:

> On the one hand, the district court's conclusion that the evidence of guilt was "overwhelming" is not clearly erroneous, and deportation would have followed just as readily from a jury conviction as from a guilty plea. . . . On the other hand, . . . we do not doubt Lee's contention that many defendants in his position, had they received accurate advice from counsel, would have decided to risk a longer prison sentence in order to take their chances at trial, slim though they were. [Pet. App. 3a–4a.]

Asking whether it would be "rational" to reject a plea that would result in deportation where the evidence of guilt was strong, the Sixth Circuit noted it

had previously held that "being denied the chance to throw 'a Hail Mary' at trial does not by itself amount to prejudice." Pet. App. 4a (citing *Pilla* v. *United States*, 668 F.3d 368, 373 (6th Cir. 2012)). Bound by the decision in *Pilla*, the panel emphasized that its conclusion "should not be read as endorsing Lee's impending deportation," Pet. App. 10a:

> It is unclear to us why it is in our national interests—much less the interests of justice—to exile a productive member of our society to a country he hasn't live in since childhood for committing a relatively small-time drug offense. [*Ibid.*]

F. A postscript on prejudice

As mentioned above, in its initial post-hearing brief in the district court, the government conceded that Mr. Lee's counsel was ineffective *and* that Mr. Lee was prejudiced by the deficiency. R. 40, Resp. of the U.S. to Pet'r's Post Hr'g Br. in Supp. of Mot. Pursuant to 28 U.S.C. § 2255, p. 2. The government expounded on its assessment of Mr. Lee's prejudice: the "record evidence elucidated that based on the petitioner's long-term ties to the United States and businesses that he owned or operated in the United States, [Mr. Lee] faced severe sanctions and would not have pleaded guilty but insisted on going to trial." *Ibid.* The government distinguished the record evidence here from that in *Pilla*, where the petitioner failed to demonstrate a reasonable probability that, but for counsel's misadvice, she would have rejected the plea and insisted on going to trial. *Id.* at 2–3. After this Court's *Chaidez* opinion foreclosed Mr. Lee's claim under *Padilla*, the government has taken the opposite position on prejudice.

SUMMARY OF THE ARGUMENT

A defendant is prejudiced where "counsel's constitutionally ineffective performance affected the outcome of the plea process." *Hill* v. *Lockhart*, 474 U.S. 52, 58–59 (1985). The Sixth Circuit has adopted a categorical approach that, when faced with "overwhelming evidence" of guilt, a defendant can never be prejudiced by accepting a plea. Pet. App. 4a.

The Sixth Circuit's approach is wrong. The strength of the prosecution's evidence is just one of many factors a defendant considers before accepting a plea, including the length of imprisonment, the type of penalty and conditions of confinement, fines, and immigration consequences. In fact, as this Court has recognized, there are few areas where a conviction's consequences matter more to a non-citizen defendant than mandatory deportation. *Padilla*, 559 U.S. at 364; *INS* v. *St. Cyr*, 533 U.S. 289, 321 (2001).

When counsel misadvises a defendant about the deportation consequences of a plea, prejudice is generally shown in three ways: (1) if the defendant demonstrates a reasonable probability of a more favorable outcome at trial that avoids deportation; (2) if a defendant would rationally reject a plea offer to negotiate for an agreement with lesser deportation consequences; or (3) if the consequences of deportation are so significant that a defendant would reasonably reject the plea and go to trial. The strength of the prosecution's evidence is of greatest significance only to the first of these three.

Here, ineffective assistance deprived Mr. Lee of an opportunity to bargain for a plea with lesser or no deportation consequences. It also deprived him of his right to trial. This Court should reverse.

ARGUMENT

I. A defendant facing strong evidence of guilt can rationally reject a plea offer because of the plea's immigration consequences.

Missouri v. *Frye*, 132 S. Ct. 1399, 1407 (2012), explains that our criminal justice system is not one of trials, but of pleas. For that reason, "the negotiation of the plea bargain, rather than the unfolding of a trial, is almost always the critical point for the defendant." *Ibid.* Accordingly, a criminal defendant has a constitutional right to effective representation in plea negotiations. *Id.* at 1407–08. A defendant's claim of ineffective assistance at the plea stage is evaluated under the familiar framework adopted in *Strickland* v. *Washington*, 466 U.S. 668 (1984). *Hill* v. *Lockhart*, 474 U.S. 52, 58 (1985). A defendant must show that counsel's performance was deficient and that the deficient performance prejudiced the defendant. *Strickland*, 466 U.S. at 687. Application of the *Strickland* analysis compels relief here.

In *Padilla* v. *Kentucky*, 559 U.S. 356, 375–76 (2010), this Court held that a lawyer renders constitutionally ineffective counsel when he fails to tell his client that pleading guilty will subject the client to deportation. Accord *id.* at 375 (Alito, J., concurring) (A "criminal defense attorney fails to provide effective assistance within the meaning of *Strickland* . . . if the attorney misleads a noncitizen client regarding the removal consequences of a conviction."). Here, Lee's counsel affirmatively misadvised him that pleading guilty would not have deportation consequences, J.A. 170, and the government concedes that Fitzgerald's performance was deficient. Pet. App. 2a–3a. Thus, the only remaining issue is whether Mr. Lee can establish prejudice. He can.

In *Hill* v. *Lockhart*, 474 U.S. 52 (1985), this Court set forth the prejudice analysis applicable to claims of ineffective assistance at the plea stage. Under *Hill*, the prejudice analysis in the context of guilty pleas "focuses on whether counsel's constitutionally ineffective performance affected the outcome of the plea process." *Id.* at 58–59. A defendant "must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 57 (quoting *Strickland*, 466 U.S. at 694). The prejudice analysis is objective. *Id.* at 59–60.

Hill points to several factors that are relevant to the prejudice determination. The Court observed that in many guilty-plea cases, the reasonableness analysis is tied to whether a defendant may have obtained a better outcome by proceeding to trial. *Id.* at 59. But the *Hill* defendant claimed prejudice because his counsel misadvised him he would be eligible for parole after serving one third of his sentence when, as a second offender, he would not be eligible for parole until he served half of his sentence. *Id.* at 55, 60. To assess whether the defendant was prejudiced, this Court considered whether the defendant had averred that he would have gone to trial rather than accept the plea had he received accurate advice, and whether there were special circumstances showing that the defendant placed particular emphasis on his parole eligibility in deciding whether to plead guilty. *Id.* at 60.

Hill shows that although the outcome at trial matters, the trial court's assessment of the defendant's likelihood of success is not always the determinative consideration in guilty-plea cases. Accord *Gonzales* v. *United States*, 722 F.3d 118, 132–33 (2d

Cir. 2013). And this Court has recognized that this is particularly true with regard to immigration consequences of a plea, noting that the availability of cancellation of removal is "one of the principal benefits sought by defendants deciding whether to accept a plea offer or instead to proceed to trial." *INS* v. *St. Cyr*, 533 U.S. 289, 321–23 (2001).

The federal and state courts have applied *Hill*'s analysis to find prejudice where counsel fails to accurately advise a defendant of the immigration consequences of a guilty plea. For example, in *United States* v. *Rodriguez-Vega*, 797 F.3d 781, 785 (9th Cir. 2015), the court determined that the defendant not properly advised of the immigration consequences of her plea could show prejudice because she placed a particular emphasis on avoiding deportation. Similarly, in *DeBartolo* v. *United States*, 790 F.3d 775, 780 (7th Cir. 2015), the petitioner was able to show through objective evidence that there was "a reasonable probability that he would not have pleaded guilty . . . ."

In the context of a guilty plea that arises from counsel's failure to correctly advise a defendant of the immigration consequences of a plea, prejudice can be shown in at least three ways. First, there can be no dispute that a defendant suffers prejudice if he can demonstrate a reasonable probability of a more favorable outcome at trial that avoids deportation. *E.g.*, *Hill*, 474 U.S. at 59. The defendant's ability to prove this type of prejudice is inversely tied to the strength of the evidence against him. See *ibid.* Second, a defendant is prejudiced if a defendant would rationally reject a plea offer to negotiate for a different plea agreement with no or lesser deportation consequences. Evidence of guilt can relate

to the hypothetical plea-bargaining process but is not determinative. Third, in certain instances, the consequences of deportation are so significant that a defendant would reasonably reject the plea and go to trial regardless of the strength of the evidence against him. *E.g.*, *DeBartolo*, 790 F.3d at 780. And under *Hill*, this too is sufficient prejudice to vacate a guilty plea. See *Massachusetts* v. *Lavrinenko*, 38 N.E.3d 278, 291–92 (Mass. 2015) (adopting similar framework).

A. A defendant can reject the government's plea offer rationally expecting to negotiate a plea that will not result in deportation.

The plea-bargaining process offers a non-citizen defendant numerous avenues for eliminating or reducing negative immigration consequences. As this Court recognized in *Padilla*, even a "rudimentary understanding of the deportation consequences of a particular offense" may allow defendant's counsel to "plea bargain creatively with the prosecutor in order to craft a conviction and sentence that reduce the likelihood of deportation." 559 U.S. at 373.

The court of appeals' opinion below discounts the possibility of negotiating a different plea to avoid mandatory deportation when counsel has and provides accurate information on immigration consequences. A criminal defendant who is misadvised on the immigration consequences of a plea offer is denied the opportunity to reject a plea that has serious deportation consequences and negotiate for a plea that will avoid deportation altogether, or at least reduce the consequences thereof. There are numerous such opportunities.

1. The United States Attorney's Pretrial Diversion Program is a disposition which does not trigger deportation consequences for the divertee. U.S. Dep't of Justice, *United States Attorneys Manual, Criminal Resources Manual*, § 712, Pretrial Diversion (2016). The availability of diversion makes rejection of the government's plea offer reasonable, at least until the possibility of diversion is withdrawn.

2. Noncitizens convicted of aggravated felonies face "the harshest deportation consequences." *Carachuri-Rosendo* v. *Holder*, 560 U.S. 563, 566 (2010). The primary penalties are that (1) the defendant is rendered deportable, and (2) the defendant is ineligible for several forms of immigration relief, including cancellation of removal, asylum, and the benefits from voluntary departure.[1] See *Torres* v. *Lynch*, 136 S. Ct. 1619, 1635 (2016) (Sotomayor, J., dissenting) (citing 8 U.S.C. § 1229b). It may well be reasonable for a defendant to reject a plea offer despite strong evidence of guilt with the reasonable expectation he can negotiate a plea to an offense that is not an aggravated felony. This would preserve the defendant's ability to avoid automatic deportation. And for that reason, a defendant might offer to plead to a non-aggravated felony even if the sentence of confinement is longer. *E.g.*, *People* v. *Bautista*, 8 Cal. Rptr. 3d 862, 870 (Cal. Ct. App. 2004).

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[1] Other immigration consequences tied to convictions for an aggravated felony include ineligibility for asylum, which would otherwise allow an immigrant with a well-founded fear of persecution in their country of origin to avoid deportation, 8 U.S.C. §§ 1101(a)(42), 1158(a)(1), (b)(2)(A)(ii), (b)(2)(B); permanent inadmissibility for reentry into the United States, 8 U.S.C. § 1182(a)(2)(A)(i); and enhanced penalties for illegal reentry, 8 U.S.C. § 1325(b)(2).

For example, if a defendant in a drug case pleads to a federal misdemeanor, the defendant will avoid the mandatory deportation consequences of an aggravated felony because the INA's aggravated-felony definition incorporates federal drug-trafficking crimes, which are keyed to whether the offense is a felony or misdemeanor under federal law. See 8 U.S.C. § 1101(a)(43)(B); *Lopez* v. *Gonzales*, 549 U.S. 47 (2006); *Carachuri-Rosendo* v. *Holder*, 560 U.S. 563 (2010); *Moncrieffe* v. *Holder*, 133 S. Ct. 1678 (2013). Thus, a defendant charged with intent to distribute could bargain for a simple possession charge under 18 U.S.C. § 844 and avoid the consequences of an aggravated felony. Possession is a misdemeanor with a maximum sentence of less than one year and not an aggravated drug-trafficking felony that results in automatic deportation. See 8 U.S.C. § 1101(a)(43)(B). Such a defendant would still be deportable, but eligible for cancellation of removal. See 8 U.S.C. § 1229b (permitting the Attorney General to cancel a non-citizen defendant's deportation if certain residency benchmarks are met, but not if the alien has committed an aggravated felony).

Here, simple possession was a disposition that Mr. Fitzgerald thought possible if Mr. Lee's case went to trial, a fact that might have made simple possession an attractive disposition for the government as well as Mr. Lee. And at the time Mr. Lee pled in 2009, first-time possession for *any* controlled substance other than Flunitrazepam (the date-rape drug) or more than five grams of crack cocaine would

have made Mr. Lee eligible for cancellation. *Lopez*, 549 U.S. at 54 & n.4.[2]

Another alternative available to a defendant would be to negotiate a plea to a drug distribution in violation of 21 U.S.C. §§ 331(t) & 353(e) (the Food, Drug, and Cosmetics Act), for a substance like Valium (which law enforcement reported finding in their search of Mr. Lee's home). Arguably, this would not be a controlled-substance offense or drug-trafficking aggravated felony. See *Borrome* v. *Attorney General of the U.S.*, 687 F.3d 150 (3d Cir. 2012).

3. The Internal Revenue Code includes multiple misdemeanor offenses to which a defendant charged with a crime that results in ill-gotten gain could plausibly plead. (Like Al Capone, persons who engage in controlled substance offenses often do not report their profits as taxable income.) These crimes do not have deportation consequences, or at least avoid mandatory deportation. For example, the failure to pay any tax is a misdemeanor offense. 26 U.S.C. § 7203. Likewise, the failure to keep records or supply information are misdemeanors. *Ibid.* See also 26 U.S.C. §§ 7204, 7205 (other IRS misdemeanors include providing false information related to withholdings). Provided the loss to the victim or government does not exceed $10,000, the offense is

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[2] Somewhat counterintuitively, in specifying the grounds of admissibility under 8 U.S.C. § 1182, Congress did not make having an aggravated-felony conviction a separate ground of inadmissibility. Consequently, not all aggravated felonies make a person inadmissible. See *In re Michel*, 21 I&N Dec. 1101 (BIA 1998) (discussing eligibility for a waiver despite an aggravated-felony conviction).

not deemed an aggravated felony for purposes of deportation. See 8 U.S.C. § 1101(a)(43)(M).

A well-counseled defendant seeking to avoid deportation could consider all of these plea possibilities. And, because consideration of a plea agreement's deportation consequences is part of a prosecutor's responsibility in seeking justice, the government too has a duty to consider them. Federal prosecutors are required to "weigh all relevant considerations, including . . . [t]he probable sentence or other consequences if the defendant is convicted." U.S. Dep't of Justice, *United States Attorneys Manual, Principles of Federal Prosecution*, § 9-27.420(A) (1997). Various state jurisdictions have adopted similar policies which require prosecutors to craft plea agreements that avoid punishments that are disproportionate to what other defendants would receive for the same crime. *E.g.*, Los Angeles County District Attorney, Felony Case Special Directive 03-04 (2003) *available at* http://tinyurl.com/zmkcjdf. Although prosecutors may not be authorized to guarantee non-deportation in a plea agreement, prosecutors should consider the immigration consequences of a conviction when making charging and plea decisions. This happens so routinely that California recently required prosecutors to "consider the avoidance of adverse immigration consequences in the plea negotiation process as one factor in an effort to reach a just resolution." Cal. Pen. C. 1016.3(b); accord Cal. Pen. C. 1016.2(d).

Proving that a defendant could rationally expect to negotiate a more favorable plea presents a challenge, as noted by the Sixth Circuit below. Pet. App. 7a–8a. A defendant may, in some instances, demonstrate the likelihood of negotiating a plea to an

offense with no or lesser deportation consequences by identifying similar plea agreements entered into by prosecutors with defendants charged with the same offense. See *United States* v. *Rodriguez-Vega*, 797 F.3d 781, 788–89 (9th Cir. 2015). A defendant can also offer testimony from an attorney with experience negotiating plea agreements that accounted for immigration consequences. *Bautista*, 8 Cal. Rptr. 3d at 870–71. But, given that ineffective-assistance claims are frequently filed by *pro se* defendants serving their sentences, such a level of proof should not be required. *Roe* v. *Flores-Ortega*, 528 U.S. 470, 486 (2000) (addressing potential unfairness of prejudice to an indigent or *pro se* defendant). The better approach is to consider whether there are offenses with no or lesser deportation consequences to which the defendant could have pled guilty for the same conduct. See *DeBartolo* v. *United States*, 790 F.3d 775, 779 (7th Cir. 2015). Indeed, in some instances, this is as straightforward as agreeing to a sentence of less than one year so as to avoid an aggravated felony. See 8 U.S.C. § 1101(a)(43)(F), (G), (P)–(S).

There are grave consequences that attend a plea for a long-term permanent resident immigrant. A defendant with such continuing connections could rationally reject a plea or pursue a plea with better immigration consequences, even in the face of strong evidence of guilt.

B. A defendant can also rationally reject a plea and take his chances at trial.

There are numerous reasons why defendants rationally reject plea offers and instead invoke their constitutional right to a trial by jury, despite what appear to be long odds of success.

1. At the outset of a criminal case, it is difficult to predict with any precision exactly what the final result following trial will be. Counsel may learn of a fact that will result in the government's key evidence being suppressed. An indispensable witness may unexpectedly fail to appear to testify at trial, or may change her testimony while on the stand. A confidential informant may prove unreliable. Or the jury may convict the defendant of a lesser offense, an outcome Mr. Fitzgerald thought possible in the case of Mr. Lee. J.A. 244.

Moreover, when unexpected things go wrong with the government's case, the prosecutor can offer a plea to a much lower offense. In but one example, *United States* v. *Enquist*, 745 F. Supp. 541 (N.D. Ind. 1990), the defendant was originally charged with possession with the intent to distribute methamphetamine and conspiracy to do the same. Before trial, a key prosecution witness could not be found, and the government doubted it could prove guilt beyond a reasonable doubt. So the prosecution offered, and the defendant accepted, a plea to a misdemeanor. The court approved the plea because of the uncertainty of trial given the missing witness.

Most fundamentally, a jury may simply conclude that the prosecution has failed to prove the defendant's guilt beyond a reasonable doubt. Such a result is not jury nullification. It is the natural result of an

individual's constitutional right to invoke a trial by jury involving the highest burden of proof known to American law. See *Padilla* v. *Kentucky*, 381 S.W.3d 322, 330 (Ky. Ct. App. 2012) ("If he had insisted on a trial, the Commonwealth would have had to prove his guilt beyond a reasonable doubt, and Padilla would have a chance of avoiding a conviction that subjected him to mandatory deportation."). A criminal defendant can never be forced to take a plea and abandon his right to a jury trial simply because a court or prosecutor thinks the defendant's odds of prevailing at trial are slim.

2. Wholly aside from the likelihood that a defendant will be acquitted or convicted of a lesser charge, he may have additional rational reasons to reject a plea that will cause mandatory deportation. A defendant might think "a small chance of remaining with his family in the United States [is] worth the significant risk of a long prison term." *DeBartolo* v. *United States*, 790 F.3d 775, 779 (7th Cir. 2015); *State* v. *Sandoval*, 249 P.3d 1015, 1022 (Wash. 2011) ("For criminal defendants, deportation no less than prison can mean banishment or exile, and separation from their families. Given the severity of the deportation consequence, we think Sandoval would have been rational to take his chances at trial.") (quotations omitted).

In fact, a defendant "might even . . . prefer[ ] a lengthy prison term in the United States to a shorter prison term that would lead more quickly to deportation." *DeBartolo*, 790 F.3d at 779–80. The "lengthy prison term would at least keep him in the same country as his family, facilitating frequent visits by family members, which is important to prisoners." *Id.* at 780. (Mr. Lee has demonstrated this prefer-

ence by choosing to remain in U.S. detention for six additional years after serving his one-year sentence rather than accept deportation.)

3. A rational defendant might also consider "the disarray in the enforcement of U.S. immigration law." *DeBartolo*, 790 F.3d at 780. "There are constant calls for reform of the laws themselves and of the methods of enforcing them." *Id.* And while there appears to be political pressure sufficient to change the law, enforcement, or both regarding *illegal* immigrants, there is no such public argument being made with respect to long-term permanent immigrants who operate successful businesses. Judge Batchelder, writing for the Sixth Circuit, expressed this sentiment: "[i]n reaching this conclusion, we should not be read as endorsing Lee's impending deportation. It is unclear to us why it is in our national interests—much less the interests of justice—to exile a productive member of our society to a country he hasn't lived in since childhood for committing a relatively small-time drug offense." Pet. App. 10a.

4. Finally, in cases where it is not possible to obtain a plea without deportation consequences, a defendant may simply decide that a trial is preferable to certain deportation. As the Third Circuit has explained, "[t]he threat of removal provides an equally powerful incentive to go to trial if a plea would result in removal anyway." *United States* v. *Orocio*, 645 F.3d 630, 645 (3d Cir. 2011), *abrogated in other part by Chaidez*, 133 S. Ct. 1103 (2013). That may not be every defendant's decision, but it is not an irrational one for a defendant with robust ties to this country.

In sum, no matter the strength of the evidence, defendants victimized by ineffective assistance of counsel should not be deprived of the opportunity to negotiate a better plea or simply put the government to its burden of proving guilt beyond a reasonable doubt.

The government's position is that a rational defendant never considers such consequences. The government insists that a rational defendant would only consider the likelihood of success at trial, and if that probability is low, the defendant would accept a plea. Not so. Consider the case of a legal immigrant from Nigeria who is LGBT. On the one hand, he could accept a plea that would result in a one-year sentence served in the United States followed by certain deportation and likely death or imprisonment in his country of origin. See Max Bearka & Darla Cameron, "Here are the 10 countries where homosexuality may be punished by death," *Washington Post* (6/13/2016) *available at* http://tinyurl.com/h6hncgs. On the other, he could take the risk and invoke his right to a trial, knowing that his U.S. sentence might be extended a few years before removal, or that he might be acquitted or convicted of an offense with no or lesser deportation consequences. Taking such a risk is not irrational.

A conviction's consequences matter. And outside the death-penalty context, there are few areas where a conviction's consequences matter more than a mandatory deportation. *Padilla*, 559 U.S. at 364 ("deportation is an integral part—indeed, sometimes the most important part—of the penalty that may be imposed on noncitizen defendants who plead guilty to specified crimes"); *INS* v. *St. Cyr*, 533 U.S. 289, 321 (2001) ("There can be little doubt that, as a gen-

eral matter, alien defendants considering whether to enter into a plea agreement are acutely aware of the immigration consequences of their convictions." (citations omitted)).

This Court should reverse and hold that it is not always irrational for a defendant to reject a plea offer notwithstanding allegedly strong evidence of guilt. Mr. Lee does not propose a *per se* rule of prejudice. He requests a rule that allows a defendant to come forward with objective evidence demonstrating that he would have bargained for a different plea offense or taken his chances at trial rather than plead guilty to an offense that resulted in his permanent exile from the United States.

II. Mr. Lee was prejudiced because he would have reasonably rejected the plea, if he had been properly advised of the deportation consequences.

As noted above, a petitioner seeking to establish prejudice under the second *Strickland* prong must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland* v. *Washington*, 466 U.S. 668, 694 (1984); see Jenny Roberts, *Proving Prejudice, Post*-Padilla, 54 How. L.J. 693, 700–06 (2011). In other words, the petitioner must show that to reject the plea and invoke the right to trial would have been "rational under the circumstances." *Padilla* v. *Kentucky*, 559 U.S. 356, 372 (2010). This inquiry requires a fact-specific analysis that evaluates the weight of the evidence, the consequences of various legal options, and any circumstances that may affect a decision to enter a plea. *E.g.*, *Premo* v. *Moore*, 131 S. Ct. 733, 744 (2011).

The record shows that Mr. Lee would have proceeded to trial but for Mr. Fitzgerald's lack of insight regarding the deportation consequences of his plea. Mr. Fitzgerald testified that, had he known removal was mandatory, he would have advised Mr. Lee to proceed to trial. J.A. 236. As Mr. Fitzgerald explained, if the plea offers nothing of benefit, he will advise going to trial because "if I try it, I may win." J.A. 236. Accord *Orocio*, 645 F.3d at 645. Mr. Fitzgerald believed there was a possibility that Mr. Lee would be found not guilty or guilty only of simple possession, J.A. 244, an offense that would not trigger mandatory deportation.

There are numerous paths to such a result without relying on a "Hail Mary." Mr. Lee would have filed a motion challenging the prosecution's search warrant, attempting to suppress the evidence seized from Lee's apartment. J.A. 181, 213. (As part of the plea agreement here, Mr. Lee waived challenging the validity of the search warrant. J.A. 179–80, 212.) As Mr. Fitzgerald testified, even motions to suppress that do not initially look promising can improve at the hearing and the court may grant the motion. J.A. 229–31. Sometimes the suppression hearing itself uncovers a new justification for going to trial. *Ibid.* Other times, the government's loss of a confidential informant or other key witness will result in an acquittal or a conviction to a lesser charge.

Aside from the various positive trial outcomes, Mr. Lee was also deprived of his ability to negotiate for a plea offense without deportation consequences. Some of the options that would avoid deportation entirely, or at least result in lesser immigration consequences, include the following:

- First and foremost, Mr. Lee could have bargained for a simple possession charge under 21 U.S.C. § 844, a conviction that Mr. Fitzgerald thought was a possible trial outcome regardless. J.A. 167, 244. As explained above, such an offense is classified as a misdemeanor and not an aggravated drug-trafficking felony that results in automatic deportation. See 8 U.S.C. § 1101(a)(43)(B). Thus, Mr. Lee would be deportable but eligible for cancellation of removal.
- Mr. Lee could have bargained for a non-prosecution agreement. Mr. Lee was a first-time offender, and if counsel had been aware that possession-with-intent-to-distribute is an aggravated felony that leads to mandatory deportation, he likely would have encouraged Mr. Lee to cooperate to obtain a non-aggravated-felony plea.
- For the same reasons, Mr. Lee may have been able to negotiate for pre-trial diversion, as described above. Mr. Lee was eligible for the program because he was not accused of an offense that should be diverted for State prosecution, did not have two or more prior felony convictions, was not a public or former public official, and was not accused of an offense related to national security or foreign affairs. United States Attorneys Manual, Title 9-22.100 (Eligibility Criteria).

- Based on the three Valium reportedly found during the search, Mr. Lee could have pled to drug distribution in violation of 21 U.S.C. §§ 331(t) & 353(e) (the Food, Drug, and Cosmetics Act). As explained above, arguably this would not be a controlled-substance offense or drug-trafficking aggravated felony.

- Mr. Lee could have pled guilty to being an accessory after the fact with a 364-day sentence under 18 U.S.C. § 3. This is not a controlled-substance offense, see *In re Batista-Hernandez*, 21 I&N Dec. 955 (BIA 1997), and it is not an aggravated-felony obstruction offense under 8 U.S.C. § 1101(a)(43)(S) if the sentence is less than one year.

- Mr. Lee might have sought a plea under the Federal First Offender Act. Under that Act, a first-time offender found guilty of an offense under the Controlled Substances Act may be placed on probation. If he does not violate any conditions of probation, the defendant may seek dismissal of the proceedings, in which case the matter will "not be considered a conviction for the purpose of a disqualification or a disability imposed by law upon conviction of a crime, or for any other purpose." 18 U.S.C. § 3607(a), (b).

- Mr. Lee also could have pled guilty to misprision of a felony under 18 U.S.C. § 4. This is neither a controlled-substance offense, see *In re Velasco*, 16 I&N Dec. 281 (BIA 1977), nor an aggravated felony obstruction offense,

see *In re Espinoza*, 22 I&N Dec. 889 (BIA 1999).[3]

A creative defense attorney with knowledge of the criminal deportation consequences of various offenses would undoubtedly have many additional proposals for a prosecutor to consider. See *Padilla*, 559 U.S. at 373 ("Counsel who possess the most rudimentary understanding of the deportation consequences of a particular criminal offense may be able to plea bargain creatively with the prosecutor in order to craft a conviction and sentence that reduce the likelihood of deportation, as by avoiding a conviction for an offense that automatically triggers the removal consequence."). And informed consideration of the deportation consequences of a plea benefits both the government and noncitizen defendants during the plea-bargaining process by allowing both sides to negotiate for an agreement that best satisfies their respective interests. The threat of mandatory deportation may motivate a defendant not only to negotiate for a plea offense without such consequences, but also to accept a plea notwithstanding a significant prison term.

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[3] A misprision conviction would be a crime involving moral turpitude. See *In re Robles-Urrea*, 24 I&N Dec. 22 (BIA 2006). But a person is deportable for a crime involving moral turpitude only if convicted within five years of being admitted into the United States or upon a second such conviction. 8 U.S.C. § 1227(a)(2)(A). Mr. Lee has been in the country for more than five years and has no such earlier conviction. For an example of a charged aggravated-felony resulting in a misprision plea, see *United States* v. *Navarete-Bravo*, No. 3:14-cr-001 (M.D. Tenn.) (transportation of illegal aliens and conspiracy to do the same).

As for the consequences of Mr. Lee's plea here, he will lose everything upon deportation and has gained little from the bargain. Mr. Lee's elderly parents reside in Brooklyn and are United States citizens. J.A. 13. He owns and operates two established businesses in the Memphis area. J.A. 163. He has spent his entire adult life in the United States and has not returned to South Korea since arriving as a child. J.A. 130, 162. All of his circumstances demonstrate that he had nothing to lose by going to trial or continuing to bargain for a non-deportable plea offense if the alternative was mandatory deportation following his guilty plea. These facts exemplify this Court's observation in *Padilla*: "[p]reserving the client's right to remain in the United States may be more important to the client than any potential jail sentence." 130 S. Ct. at 1483 (quotation omitted). Accord, *e.g.*, *United States* v. *Scott*, 394 F.3d 111, 119–20 (2d Cir. 2005) (finding *Strickland* prejudice in non-criminal deportation context where the petitioner demonstrated strong family ties, long-term residency in the United States, and counsel's errors).

The government may echo the Sixth Circuit's assessment that the record was devoid of evidence that Mr. Lee's counsel could have secured a plea that would have avoided mandatory deportation. Pet. App. 7a–8a. To begin, there could not have been any attempt to negotiate a better plea considering deportation consequences when Mr. Fitzgerald (and thus the client) mistakenly believed there would be no deportation consequences from Mr. Lee accepting the government's plea offer. And, as noted above, Mr. Fitzgerald testified at the evidentiary hearing that he thought the "best thing that could come out of [a trial] was maybe a possession, that's it," J.A. 238, demonstrating that he did not appreciate the lesser

deportation consequences of such a conviction. Mr. Fitzgerald also testified that Mr. Lee would have accepted a three-year sentence if it included a reliable assurance that Mr. Lee would not be deported. J.A. 244. This testimony confirms Mr. Lee's willingness to bargain away a considerable amount of liberty in exchange for a plea offer that avoided deportation.

The government may also continue to argue that Mr. Lee's only hope was jury nullification. Br. in Opp. 8–9. That argument is wrong, particularly given how early in the criminal proceedings Mr. Lee accepted the plea agreement. Mr. Lee testified that trial counsel never reviewed the elements of the crime with which the government charged him, and never explained what the government would have to prove at trial to secure a conviction. J.A. 177. Nor did counsel inform Mr. Lee that there was a confidential informant involved in his case; Mr. Lee learned this critical fact for the first time after he had already entered his guilty plea, when he saw his Pre-Sentence Report. J.A. 178. Trial counsel never even looked at the CD the government provided with photographs of the search of Mr. Lee's apartment. J.A. 185. It is difficult to imagine how anyone could have assessed the strength of Mr. Lee's case without reviewing these basic elements. Yet, despite all this, Mr. Fitzgerald testified that a successful defense of mere personal use was "not impossible." J.A. 218.

There is no doubt that Mr. Lee would have been willing to remain incarcerated for a longer period of time than the one year he actually received as a result of his deportable guilty plea. After finishing his year-and-a-day sentence, he was immediately placed into immigration custody and has been detained for an additional six years pending

resolution of his § 2255 motion and all subsequent appeals. At any time after he served his sentence, Mr. Lee could have allowed himself to be deported. He did not because he would rather serve more time in prison and remain in a country he considers his own than be deported to a land he has not been to since childhood.

Based on all the objective evidence, Mr. Lee would have rationally rejected the guilty plea that he entered had he known about its mandatory deportation consequence. There is at least a reasonable likelihood that competent defense counsel could have secured some type of disposition that avoided mandatory deportation based on the numerous ways a plea could have been structured to meet both parties' interests. And failing that, Mr. Lee would have chosen a trial over deportation. That is why the government initially conceded that Mr. Lee had demonstrated prejudice.

This Court should reverse the Sixth Circuit and grant Mr. Lee's § 2255 petition.

CONCLUSION

The judgment of the court of appeals should be reversed.

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In the Supreme Court of the United States

JAE LEE, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES

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QUESTION PRESENTED

Petitioner, a noncitizen defendant against whom the evidence of guilt was overwhelming, pleaded guilty after receiving deficient advice about the immigration consequences of conviction. The question presented is whether he may establish the prejudice necessary to show ineffective assistance of counsel when it was objectively unreasonable to believe that he could have avoided removal by going to trial or through plea negotiations.

TABLE OF CONTENTS

Page

Opinions below 1
Jurisdiction 1
Constitutional and statutory provisions involved 2
Statement:
A. Petitioner's offense and conviction 2
B. Petitioner's collateral challenge to his conviction 7
Summary of argument 12
Argument:
Petitioner failed to show prejudice from his guilty plea when he would have equally been exposed to removal by declining the plea 15
I. A showing of *Strickland* prejudice requires proof that attorney error adversely affected a viable defense strategy 16
A. This Court has consistently conditioned *Strickland* relief on a showing that counsel's deficiencies deprived the defendant of a realistic litigation option 16
B. Granting *Strickland* relief to a defendant who lacked a realistic litigation alternative would be unsound 22
II. A *Padilla* claimant who lacks an objectively viable strategy for avoiding removal cannot show he was prejudiced by a plea 26
A. A *Padilla* claimant's subjective preference for trial cannot in itself establish that he was prejudiced by accepting an objectively favorable plea offer 27
B. A defendant cannot establish *Strickland* prejudice by hypothesizing theoretical plea deals with no evidentiary basis 32

Table of Contents—Continued: Page

III. Petitioner cannot show that he had a strategically viable alternative to accepting the government's plea offer 36
A. Petitioner has not shown a reasonable probability that he could have achieved a better result by going to trial 37
B. Petitioner's speculation about alternative plea offers provides no basis for *Strickland* relief 42
Conclusion 46
Appendix — Constitutional and statutory provisions 1a

TABLE OF AUTHORITIES

Cases:

Barker v. *Wingo*, 407 U.S. 514 (1972) 26
Bousley v. *United States*, 523 U.S. 614 (1998) 24
Evans v. *Meyer*, 742 F.2d 371 (7th Cir. 1984) 19
Hill v. *Lockhart*, 474 U.S. 52 (1985) ..... *passim*
Kovacs v. *United States*, 744 F.3d 44 (2d Cir. 2014) 10, 26
Lafler v. *Cooper*, 566 U.S. 156 (2012) ..... *passim*
Menna v. *New York*, 423 U.S. 61 (1975) 24
Missouri v. *Frye*, 566 U.S. 134 (2012) 16, 22, 33, 35, 43, 45
Moncrieffe v. *Holder*, 133 S. Ct. 1678 (2013) 29
Padilla v. *Commonwealth*, 381 S.W.3d 322 (Ky. Ct. App. 2012) 20
Padilla v. *Kentucky*, 559 U.S. 356 (2010) ..... *passim*
Pepper v. *United States*, 562 U.S. 476 (2011) 32
Premo v. *Moore*, 562 U.S. 115 (2011) 24, 35, 40
Roe v. *Flores-Ortega*, 528 U.S. 470 (2000) 20, 21, 22
Strickland v. *Washington*, 466 U.S. 668 (1984) ..... *passim*
United States v. *Akinsade*, 686 F.3d 248 (4th Cir. 2012) 10, 26

Cases—Continued: Page

United States v. *Cronic*, 466 U.S. 648 (1984) 18
United States v. *Jackson*, 55 F.3d 1219 (6th Cir.), cert. denied, 516 U.S. 926 (1995) 4
United States v. *Kayode*, 777 F.3d 719 (5th Cir. 2014) 10
United States v. *Morrison*, 449 U.S. 361 (1981) 23
United States v. *Timmreck*, 441 U.S. 780 (1979) 23, 24
United States v. *Wallace*, 532 F.3d 126 (2d Cir.), cert. denied, 555 U.S. 1009 (2008) 4
Vermont v. *Brillon*, 556 U.S. 81 (2009) 26
Weatherford v. *Bursey*, 429 U.S. 545 (1977) 35

Constitution, treaty, statutes, regulation, guidelines and rule:

U.S. Const. Amend. XI 1a
Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment Art. 3, Dec. 10, 1984, S. Treaty Doc. No. 20, 100th Cong., 2d Sess. (1988), 1465 U.N.T.S. 85 29
Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, Tit. VII, Subtit. J, § 7342, 102 Stat. 4469 5
Immigration and Nationality Act,
8 U.S.C. 1101 *et seq.* 4
8 U.S.C. 1101(a)(43) 45
8 U.S.C. 1101(a)(43)(B) 5, 1a
8 U.S.C. 1101(f)(8) 5
8 U.S.C. 1158 ..... 2a
8 U.S.C. 1158(b)(2)(A)(ii) 5
8 U.S.C. 1158(b)(2)(B)(i) 5
8 U.S.C. 1227(a)(2)(A)(iii) 5, 44, 3a
8 U.S.C. 1229b(a)(3) 5, 3a
8 U.S.C. 1229c(b)(1)(B) 5
8 U.S.C. 1231(b)(3) 29

Statutes, regulation, guidelines and rule—Continued: Page

8 U.S.C. 1326(a) 5
8 U.S.C. 1326(b)(2) 5
18 U.S.C. 3553(f) 4
18 U.S.C. 3553(f)(2) 6
18 U.S.C. 3553(f)(5) 4
21 U.S.C. 841 ..... 4a
21 U.S.C. 841(a)(1) ..... *passim*
21 U.S.C. 841(b)(1)(C) 5
18 U.S.C. 924(c)(2) (1988) 5
18 U.S.C. 924(c)(2) 5, 4a
28 U.S.C. 2255 ..... 2, 7
8 C.F.R. 1208.17(a) 29
United States Sentencing Guidelines Ch. 5, Pt. A 6
Fed. R. Crim. P. 11(b)(3) 45

Miscellaneous:

Fed. Bureau of Prisons, U.S. Dep't of Justice, *Designations*, https://www.bop.gov/inmates/custody_and_care/designations.jsp (last visited Mar. 3, 2017) 30
H.R. Rep. No. 22, 104th Cong., 1st Sess. (1995) 45
U.S. Dep't of Justice:
Standards for Consideration of Clemency Petitioners, https://www.justice.gov/pardon/about-office-0 (last updated Jan. 13, 2015) 30
U.S. Attorneys' Manual, https://www.justice.gov/usam/united-states-attorneys-manual (last updated Jan. 2017) 43, 44

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JAE LEE, PETITIONER

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BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-10a) is reported at 825 F.3d 311. The order of the district court (Pet. App. 11a-50a) is unreported but is available at 2014 WL 1260388. The report and recommendation of the magistrate judge (Pet. App. 51a-77a) is unreported but is available at 2013 WL 8116841.

JURISDICTION

The judgment of the court of appeals was entered on June 8, 2016. The petition for a writ of certiorari was filed on September 6, 2016, and was granted on December 14, 2016. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The relevant constitutional and statutory provisions are reprinted in an appendix to this brief. App., *infra*, 1a-6a.

STATEMENT

Following a guilty plea in the United States District Court for the Western District of Tennessee, petitioner was convicted of possessing ecstasy with the intent to distribute it, in violation of 21 U.S.C. 841(a)(1). Pet. App. 12a, 15a. He was sentenced to 12 months and one day of imprisonment, to be followed by three years of supervised release. *Id.* at 16a-17a. Petitioner filed a motion under 28 U.S.C. 2255 to vacate his conviction and sentence, based on a claim of ineffective assistance of counsel arising out of his attorney's deficient advice about the immigration consequences of his plea. The district court denied relief, Pet. App. 11a-50a, and the court of appeals affirmed, holding that petitioner could not establish prejudice as required by *Strickland* v. *Washington*, 466 U.S. 668 (1984), because he could not show that rejection of his plea bargain would have been objectively rational under the circumstances, Pet. App. 1a-10a.

A. Petitioner's Offense And Conviction

1. Petitioner was a restauranteur and drug dealer in Memphis, Tennessee. Pet. App. 2a, 12a-14a. A confidential informant told federal agents that, over the course of eight years, petitioner sold the informant roughly 200 ecstasy pills, as well as two ounces of hydroponic marijuana. *Id.* at 12a-13a. The informant also told the agents that, due to an earlier purchase of drugs on credit, the informant owed petitioner a $150

"drug debt." *Id.* at 13a. The agents provided the informant with $150 and instructions to meet with petitioner to settle the debt. *Ibid.* The informant took the money to petitioner's townhouse and spent about ten minutes inside. *Ibid.*; see Presentence Investigation Report (PSR) ¶ 36. After emerging, the informant reported having seen petitioner "packaging 15 Ecstasy tablets into a cellophane wrapper." Pet. App. 13a.

Shortly thereafter, the agents arranged for the informant to make a controlled purchase of ecstasy from petitioner. Pet. App. 13a. Under the surveillance of the agents, and while wearing a recording device, the informant went to petitioner's townhouse with $300. *Ibid.* Petitioner met the informant there and said that he now charged $20 a pill instead of $15. *Ibid.* The informant agreed to the new price and bought 15 ecstasy pills, which were later turned over to the agents. *Ibid.*

The agents obtained a warrant to search petitioner's townhouse. Pet. App. 14a. Their search uncovered 88 ecstasy pills, $32,432 in cash, three Valium tablets, and a loaded 7.62-caliber rifle. *Ibid.* According to the agents, after being advised of his *Miranda* rights, petitioner acknowledged ownership of "[a]ll of the narcotics" found in the townhouse. J.A. 75. He also told the agents that he "gave [the ecstasy] away" to other people, although he (at that time) denied selling it. *Ibid.*

2. A federal grand jury in the Western District of Tennessee indicted petitioner on one count of possessing ecstasy (a Schedule I drug) with the intent to distribute it, in violation of 21 U.S.C. 841(a)(1). Pet. App. 12a; J.A. 5. The elements of that offense are "knowing[] or intentional[] * * * possess[ion]" of a

"controlled substance," and an "intent to * * * distribute" it. 21 U.S.C. 841(a)(1). "Proof of intent to sell is not required." *United States* v. *Jackson*, 55 F.3d 1219, 1226 (6th Cir.) (emphasis omitted), cert. denied, 516 U.S. 926 (1995); see *United States* v. *Wallace*, 532 F.3d 126, 129 (2d Cir.) (citing circuit decisions recognizing "that distribution within the meaning of [Section] 841(a) can take place without a sale"), cert. denied, 555 U.S. 1009 (2008).

a. The parties discussed a plea agreement under which petitioner could receive credit under the Sentencing Guidelines for acceptance of responsibility and might qualify for a reduced sentence under the statutory "safety valve" provision, 18 U.S.C. 3553(f). Pet. App. 55a. During those discussions, petitioner and his counsel participated in a proffer session, at which petitioner admitted to "selling drugs for money." J.A. 223; see 18 U.S.C. 3553(f)(5) (requiring defendant to "truthfully provide[] to the Government all information and evidence the defendant has concerning the offense" to qualify for the safety valve). Although an agreement precluded the government from introducing that admission in its case-in-chief at a trial, the government could use it to impeach petitioner if he were to make an inconsistent statement in a judicial proceeding. J.A. 223, 231-232, 238.

b. Petitioner is a native of South Korea who arrived in the United States as a minor in 1982. Pet. App. 2a. Unlike his parents, petitioner did not become a United States citizen, but instead remained an alien, with lawful-permanent-resident status. *Id.* at 2a, 52a. Under the Immigration and Nationality Act (INA), 8 U.S.C. 1101 *et seq.*, conviction of an "aggravated felony" requires removal from the United States and

has other immigration consequences. See 8 U.S.C. 1227(a)(2)(A)(iii) (removability); see also, *e.g.*, 8 U.S.C. 1101(f)(8) and 1229c(b)(1)(B) (voluntary departure ineligibility), 1158(b)(2)(A)(ii) and (B)(i) (asylum ineligibility), 1229b(a)(3) (cancellation ineligibility), 1326(a) and (b)(2) (increased statutory maximum penalty for illegal reentry). Since its inception, the definition of "aggravated felony" has included "any felony punishable under the Controlled Substances Act (21 U.S.C. 801 et seq.)." 18 U.S.C. 924(c)(2); see 8 U.S.C. 1101(a)(43)(B); see also 18 U.S.C. 924(c)(2) (1988); Anti-Drug Abuse Act of 1988, Tit. VII, Subtit. J, Pub. L. No. 100-690, § 7342, 102 Stat. 4469.

Because a violation of Section 841(a)(1) is a felony under the Controlled Substances Act with a maximum penalty of 20 years of imprisonment, it qualifies as an "aggravated felony" under the INA, and conviction of that offense subjects an alien to removal. See 21 U.S.C. 841(b)(1)(C); Pet. App. 2a-3a. Petitioner's retained attorney, however, "assured him that he would not be subject to * * * removal" if he pleaded guilty, apparently based on a mistaken belief that the prosecution had discretion not to seek removal. Pet. App. 2a (internal quotation marks omitted); see *id.* at 53a, 60a; see also J.A. 215-216.

c. Petitioner ultimately entered into a written plea agreement with the government, under which the government would recommend a three-level acceptance-of-responsibility adjustment in the calculation of his Sentencing Guidelines range and would not object to application of the safety-valve provision. J.A. 6-8. At petitioner's change-of-plea hearing, the district court advised him that "conviction on this charge * * * could result in your being deported." J.A. 103. Peti-

tioner's attorney, however, privately reassured him that he would not be removed, and he proceeded to enter a guilty plea. Pet. App. 61a; J.A. 98-114. The district court found a factual basis for the plea in the government's representations that the evidence at trial would have included, *inter alia*, testimony from law-enforcement agents that the amount of ecstasy recovered from the townhouse was "consistent with distribution rather than personal use." J.A. 109; see J.A. 110.

3. In anticipation of sentencing, the Probation Office calculated a Sentencing Guidelines range of 24 to 30 months of imprisonment, based on an offense level of 17 and a criminal history category of I. J.A. 119. In accordance with the plea agreement, that calculation included a three-level downward adjustment to the offense level for acceptance of responsibility. *Ibid.* It also included a two-level enhancement to the offense level for petitioner's possession of a dangerous weapon (the loaded rifle) at the time of the offense, *ibid.*, a fact that additionally disqualified him from the statutory safety valve, J.A. 121; see 18 U.S.C. 3553(f)(2). Without the three-level downward adjustment for acceptance of responsibility, petitioner's offense level would have been 20, and his Guidelines range would have been 33 to 41 months of imprisonment. See Sentencing Guidelines Ch. 5, Pt. A (2008) (table).

At sentencing, petitioner's counsel argued that petitioner's offense was just "one glitch" in an otherwise "exemplary" life since immigrating to the United States and requested a sentence of probation or, at most, "six months [in a] halfway house." J.A. 120-122. The district court, however, rejected that characterization of petitioner's crime and determined that stricter punishment was appropriate. See J.A. 122, 124-125. The

court emphasized the undisputed evidence that that petitioner's drug dealing was a "very * * * serious offense" that "ha[d] been ongoing for some period of time." J.A. 124. Although "he was not caught until now," petitioner "ha[d] been engaged in drug trafficking for ten years." J.A. 122. "It was not simply one aberrant act," the court explained, "but apparently one time getting caught." J.A. 124. The court also considered it "fool hardy to believe that" petitioner's "ten year term" of drug dealing "included only the three hundred" pills bought by the confidential informant or found in petitioner's townhouse. J.A. 125. Thus, although certain mitigating factors existed (such as petitioner's work history and nonviolent past), the court imposed a term of imprisonment of 12 months and a day. *Ibid.* Petitioner did not appeal. Pet. App. 18a.

B. Petitioner's Collateral Challenge To His Conviction

1. Petitioner filed a motion under 28 U.S.C. 2255 to vacate his conviction and sentence on the ground that his attorney had provided ineffective assistance of counsel by, *inter alia*, misadvising him about the immigration consequences of his plea. Pet. App. 18a-19a. A magistrate judge held an evidentiary hearing on petitioner's motion. J.A. 152-251. At the hearing, petitioner testified that his attorney had assured him that he would not be removed based on his plea, J.A. 173, and that, had he known his plea would result in removal, he would have proceeded "to a trial all the way with my strong evidence and my witnesses," J.A. 180. Those witnesses, petitioner explained, would have testified that he was a "hard working man" who "may party using ecstasy and give it away to friends." *Ibid.*

Petitioner's former attorney testified that he was not aware that conviction under Section 841(a)(1) would

result in mandatory deportation. Pet. App. 54a. He further testified that with knowledge of that immigration consequence, he would have advised petitioner to go to trial and believed that petitioner would have done so. *Id.* at 56a; see J.A. 236-237. But he acknowledged that this "was 'a bad case to try' because, among other reasons, there was no basis for attacking the search of [petitioner's] residence, and the number of pills recovered together with [petitioner's] alleged sale of the drug to a confidential informant severely undermined any possible defense that the drugs were for personal use and not for distribution." Pet. App. 54a; see J.A. 213, 219, 236-238. Petitioner's attorney also recognized that petitioner "probably would have gotten a greater sentence" following a conviction at trial. J.A. 239.[1]

The magistrate judge recommended that petitioner's conviction be vacated based on a showing of ineffective assistance of counsel under *Strickland*. Pet. App. 76a. The magistrate judge concluded that, because petitioner strongly desired to avoid removal, his view that he had "nothing to lose by going to trial" made it rational to reject the plea, regardless of his "likelihood of success" at trial. *Id.* at 75a (citation and internal quotation marks omitted); see *id.* at 76a; see also *id.* at 75a (noting that government had originally conceded prejudice before arguing that "the test for prejudice is objective, not subjective").

2. The district court denied relief. Pet. App. 20a, 48a. The court recognized—in accordance with this Court's decision in *Padilla* v. *Kentucky*, 559 U.S. 356,

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[1] Neither petitioner nor his attorney provided evidence that, had they understood that conviction under Section 841(a)(1) would result in removal, they could or would have negotiated a plea agreement that would have avoided that result.

360 (2010)—that counsel's incorrect advice amounted to deficient attorney performance under *Strickland*. Pet. App. 30a-31a. The court determined, however, that petitioner could not satisfy *Strickland*'s requirement to show that the deficient performance had prejudiced him. See *id.* at 31a-48a. Although the magistrate judge had recommended a finding of prejudice, the court criticized the magistrate judge's "entirely subjective" focus on petitioner's "ties to the United States and his desire to avoid deportation" as the basis for that conclusion, finding that a subjective approach conflicted with the "objective" prejudice inquiry that *Strickland* demands. *Id.* at 46a.

The district court explained that "[t]o demonstrate prejudice" under *Strickland*, "a prisoner must establish 'a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.'" Pet. App. 25a (quoting 466 U.S. at 694). It observed that this Court "has emphasized" that establishing prejudice in the context of a guilty plea requires "'convinc[ing] the court that a decision to reject the plea bargain would have been rational under the circumstances.'" *Id.* at 31a (quoting *Padilla*, 559 U.S. at 372). The court determined that petitioner could not carry that burden because he "ha[d] no rational defense to the charge and no realistic prospect of avoiding conviction and deportation." *Id.* at 47a.

"In light of the overwhelming evidence of [petitioner's] guilt," the district court reasoned, "a decision to take the case to trial would have almost certainly resulted in a guilty verdict, a significantly longer prison sentence, and subsequent deportation." Pet. App. 46a. The court observed that petitioner's "per-

sonal use" defense would have been undermined by "the number of pills that were seized and the sales to the confidential informant." *Id.* at 45a. And it noted that petitioner had "received tangible benefits from the plea deal," which "appear[ed] to have greatly reduced [his] sentence." *Id.* at 46a.

3. The court of appeals affirmed. Pet. App. 1a-10a. The government conceded that petitioner's counsel had rendered deficient performance, so the court considered only whether petitioner had established prejudice. *Id.* at 3a.

a. The court of appeals acknowledged that immigration consequences are "relevant to the prejudice inquiry," because "a 'reasonable' non-citizen charged with a deportation-triggering offense will, if properly advised, consider deportation consequences in deciding whether to plead guilty." Pet. App. 8a. The court accordingly recognized that such a defendant "might, as a result, be willing to go to trial even if he faces a low probability of success, one that might lead a citizen to accept a plea." *Ibid.* But the court declined to hold "that a decision to reject a plea deal that would trigger deportation consequences is *ipso facto* 'rational under the circumstances' regardless of the merits of the defense." *Ibid.* It instead "join[ed] the Second, Fourth, and Fifth Circuits in holding that a claimant's ties to the United States should be taken into account in evaluating, *alongside the legal merits*, whether counsel's bad advice caused prejudice." *Id.* at 10a; see *id.* at 4a (citing *United States* v. *Kayode*, 777 F.3d 719, 724-729 (5th Cir. 2014); *Kovacs* v. *United States*, 744 F.3d 44, 52-53 (2d Cir. 2014); and *United States* v. *Akinsade*, 686 F.3d 248, 255-256 (4th Cir. 2012)).

The court of appeals rejected an approach to *Strickland* prejudice that would effectively give dispositive weight to a defendant's assertion that he would have "throw[n] 'a Hail Mary' at trial" had he known the immigration consequences of a conviction. Pet. App. 4a. The court observed that in *Padilla*, this Court had "emphasized 'the fact that it is often quite difficult for petitioners who have acknowledged their guilt to satisfy *Strickland*'s prejudice prong'" and had "declined to craft a deportation-specific prejudice rule" for a defendant who, like petitioner here, "had lived in the United States legally for decades and had alleged that 'he would have insisted on going to trial if he had not received incorrect advice from his attorney.'" *Id.* at 9a (quoting *Padilla*, 559 U.S. at 359, 371 n.12). The court of appeals accordingly refused to endorse a legal rule that "would provide those in [petitioner's] position with a ready-made means of vacating their convictions *whenever* they can show that counsel failed to adequately explain deportation consequences." *Ibid.*

b. The court of appeals concluded that petitioner had not established prejudice under an objective test. Pet. App. 10a. The court accepted "the district court's conclusion that the evidence of guilt was 'overwhelming'" and observed that "deportation would have followed just as readily from a jury conviction as from a guilty plea." *Id.* at 3a. The court found "[n]othing in the record [to] suggest[] that [petitioner] would have been acquitted at trial, or would have been able to obtain a conviction for an offense that did not require deportation." *Id.* at 7a (citation omitted). The court accordingly determined that, "aside from the off chance of jury nullification or the like, [petitioner]

stood to gain nothing from going to trial but more prison time." *Id.* at 3a.

"'[T]he possibility of arbitrariness, whimsy, caprice, nullification, and the like,'" however, "'are irrelevant to the prejudice inquiry' under *Strickland*." Pet. App. 7a (quoting *Strickland*, 466 U.S. at 695 (internal quotation marks omitted)). The "problem for [petitioner]," the court of appeals explained, "is that he has no *bona fide* defense, not even a weak one." *Id.* at 10a. The court further deemed the possibility that "the prosecutor might have agreed to allow [petitioner] to plead guilty to a non-deportable offense if his attorney had pursued the matter" to be "sheer speculation," with "nothing in the record * * * indicating that such an attempt would have changed the ultimate outcome of [petitioner's] case." *Id.* at 7a-8a.

SUMMARY OF ARGUMENT

A defendant cannot establish prejudice from deficient advice about the immigration consequences of a guilty plea when overwhelming evidence makes a favorable trial outcome unrealistic and no evidence exists that counsel could have struck a deal that would have avoided removal. *Strickland* prejudice requires a defendant to show an objectively rational reason to have rejected a plea, not one based on the hope of an irrational trial outcome or a speculatively better plea.

I. This Court's decision in *Strickland* v. *Washington*, 466 U.S. 668 (1984), requires a defendant who seeks to set aside a conviction on ineffective-assistance-of-counsel grounds to prove both deficient attorney performance and resulting prejudice. In applying *Strickland*'s prejudice inquiry, the Court has consistently required a defendant to show that counsel's deficiencies "actually had an adverse effect on the de-

fense," *id.* at 693, by depriving him of an objectively viable litigation strategy. That requirement applies equally to a defendant claiming deficient immigration-related advice under *Padilla* v. *Kentucky*, 559 U.S. 356 (2010). A *Padilla* claimant must provide more than a subjective after-the-fact assertion that he would have declined a plea if he had known it would result in removal. He must show that such a choice would have been "rational under the circumstances," *id.* at 372, because he had an objectively superior alternative to the government's plea offer.

Strickland relief is not appropriate where the only available alternatives would have led to a worse result, not a better one. This Court has carefully cabined the availability of such relief, in recognition of its significant intrusion on finality interests, which weigh particularly heavily in convictions based on guilty pleas. Attaching dispositive weight to a defendant's subjective assertions that he would gone to trial, regardless of any objective likelihood of success, would make *Strickland* relief all but automatic in such cases. That result would not only contravene *Padilla* itself—which highlighted the prejudice inquiry as a significant limitation on the effect of its holding, see 559 U.S. at 371-372—but would lead to unjust results. A defendant who could not realistically have done any better at the time of the plea should not be entitled to return to his original position and make a new choice, long after memories may have faded and the prospects for successful prosecution may have changed.

II. Petitioner errs in suggesting that a defendant's subjective desire to avoid removal—even when removal was objectively unavoidable—justifies *Strickland* relief. When the evidence is overwhelming, either

a plea or a trial would have led to removal, and rejection of the plea would have resulted in a harsher sentence. Finding *Strickland* prejudice in those circumstances would erode the significance of prejudice as an objective test. A defendant is not entitled to rely on the possibility of random or arbitrary results, such as jury nullification, as a basis for relief under *Strickland*.

A defendant similarly cannot justify relief under *Strickland* based on speculation that he could have negotiated a more favorable plea agreement if he had appreciated the immigration consequences of conviction. The Court has never permitted a *Strickland* claimant to set aside a conviction based solely on conjecture about hypothetical alternative plea offers, an approach under which any number of such claimants could establish prejudice without any supporting evidence. Regardless of his desire for a disposition that would avoid removal, a defendant has no right to any plea offer, let alone a particular plea offer substantially more advantageous than the one he actually received.

III. Petitioner has not shown that, in the circumstances of this case, he had an objectively viable alternative to his guilty plea that would have avoided removal. Petitioner's suggestion that he was prejudiced by accepting the plea offer rather than going to trial is misguided. A jury faithfully applying the law to the facts would have had no basis for acquitting petitioner or convicting him of a less serious offense. And petitioner's speculation that he could have obtained a more favorable plea offer is likewise misplaced. The government here did not offer a plea agreement under

which petitioner could have avoided removal, and no evidence suggests that it would have.

ARGUMENT

PETITIONER FAILED TO SHOW PREJUDICE FROM HIS GUILTY PLEA WHEN HE WOULD HAVE EQUALLY BEEN EXPOSED TO REMOVAL BY DECLINING THE PLEA

Under *Strickland* v. *Washington*, 466 U.S. 668 (1984), a "convicted defendant's claim that counsel's assistance was so defective as to require reversal of a conviction * * * has two components." *Id.* at 687. First, "the defendant must show that counsel's representation fell below an objective standard of reasonableness." *Id.* at 688. Second, the defendant "must show that [counsel's performance] actually had an adverse effect on the defense." *Id.* at 693. In *Padilla* v. *Kentucky*, 559 U.S. 356 (2010), the Court held that a defendant can show deficient performance of counsel when his attorney failed to advise, or misadvised, him about the potential removal consequences of pleading guilty. *Id.* at 360; see *id.* at 369-371. *Padilla* further held that when a defendant makes that showing, his "entitle[ment] to relief depends on whether he has been prejudiced" under *Strickland*. *Id.* at 360.

Although petitioner in this case has established deficient performance under *Padilla*, he is not entitled to have his conviction set aside, because he has not shown that his attorney's misadvice "actually had an adverse effect on the defense." *Strickland*, 466 U.S. at 693. A decision to go to trial in the face of "overwhelming" (Pet. App. 3a) evidence of guilt would have resulted in a *longer* prison sentence, with the same removal consequence he currently faces. A better outcome could have resulted only from an irrational result at trial, which is not cognizable consideration

under *Strickland*. And petitioner's "sheer speculation," *id.* at 8a, that he could have obtained a nontrial disposition far more favorable in all respects than the one actually offered by the government is neither legally nor factually a tenable basis for relief.

I. A SHOWING OF *STRICKLAND* PREJUDICE REQUIRES PROOF THAT ATTORNEY ERROR ADVERSELY AFFECTED A VIABLE DEFENSE STRATEGY

Strickland makes clear that an attorney's "deficient performance prejudiced the defense," 466 U.S. at 687, and warrants reversal of a conviction, only when it caused the defendant to forgo an objectively rational strategy for improving his position. A defendant who pleaded guilty in the face of overwhelming evidence, but who now claims that, with awareness of mandatory removal consequences, he would have gone to trial or tried to secure a better plea agreement cannot make that showing. A defendant "has no entitlement to the luck of a lawless decisionmaker," *id.* at 695, and "no right to be offered a plea," *Missouri* v. *Frye*, 566 U.S. 134, 148 (2012), and thus cannot premise *Strickland* prejudice on the hope of an irrational acquittal or a hypothetical plea offer.

A. This Court Has Consistently Conditioned *Strickland* Relief On A Showing That Counsel's Deficiencies Deprived The Defendant Of A Realistic Litigation Option

1. In *Strickland*, the Court considered the standard for establishing prejudice in the context of attorney deficiencies "at the trial or sentencing." 466 U.S. at 671; see *id.* at 691-696. The Court held that to prevail, the "defendant must show * * * a reasonable probability that, but for counsel's unprofessional er-

rors, the result of the proceeding would have been different." *Id.* at 694.

The Court explained that the defendant's proof must "undermine confidence in the outcome" by demonstrating that an objectively "reasonabl[e], conscientious[], and impartial[]" decisionmaker might well have reached "a result more favorable to the defendant." *Strickland*, 466 U.S. at 694, 695. "[T]he ultimate focus of inquiry," the Court emphasized, "must be on the fundamental fairness of the proceeding whose result is being challenged," *id.* at 696, as informed by the objective merits of the defense strategy that counsel's errors foreclosed, see *id.* at 694-695.

To that end, the inquiry "must exclude the possibility of arbitrariness, whimsy, caprice, 'nullification,' and the like." *Strickland*, 466 U.S. at 695. Thus, "evidence about, for example, a particular judge's sentencing practices, should not be considered in the prejudice determination." *Ibid.* Even the testimony of the decisionmaker himself (*e.g.*, the sentencing judge) "is irrelevant to the prejudice inquiry." *Id.* at 700.

2. In *Hill* v. *Lockhart*, 474 U.S. 52 (1985), the Court incorporated *Strickland*'s objective approach into the analysis of whether a defendant has been prejudiced by deficient attorney performance during the plea process. The Court held that a defendant who alleges that his guilty plea was "based on ineffective assistance of counsel" must satisfy *Strickland*'s prejudice requirement by demonstrating "a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial." *Id.* at 58, 59. As petitioner acknowledges (Br. 17), prejudice analysis under *Hill* "is objective."

The Court did not hold in *Hill* that a defendant can show prejudice simply by making a subjective post hoc assertion that, but for counsel's deficiencies, he would have gone to trial. The Court instead emphasized that "[i]n many guilty plea cases, the 'prejudice' inquiry will closely resemble the inquiry engaged in by courts reviewing ineffective-assistance challenges to convictions obtained through a trial." *Hill*, 474 U.S. at 59. As the Court recognized, the analysis of whether an attorney's deficiencies caused a defendant to plead guilty is tied to whether an objectively reasonable attorney would have viewed—and thus recommended—trial as a viable option. See *ibid.*; cf. *United States* v. *Cronic*, 466 U.S. 648, 656 n.19 (1984) ("If there is no bona fide defense to the charge, counsel cannot create one and may disserve the interests of his client by attempting a useless charade.").

"For example," the Court explained, "where the alleged error of counsel is a failure to investigate or discover potentially exculpatory evidence, the determination whether the error 'prejudiced' the defendant by causing him to plead guilty rather than go to trial will depend on the likelihood that discovery of the evidence would have led counsel to change his recommendation as to the plea." *Hill*, 474 U.S. at 59. "This assessment, in turn, will depend in large part on a prediction whether the evidence likely would have changed the outcome of a trial." *Ibid.* "Similarly," the Court continued, "where the alleged error of counsel is a failure to advise the defendant of a potential affirmative defense to the crime charged, the resolution of the 'prejudice' inquiry will depend largely on whether the affirmative defense likely would have succeeded at trial." *Ibid.* The Court reiterated *Strickland*'s re-

quirement that "these predictions of the outcome at a possible trial, where necessary, should be made objectively, without regard for the 'idiosyncrasies of the particular decisionmaker.'" *Id.* at 59-60 (quoting *Strickland*, 466 U.S. at 695).

As an illustration of the correct approach, the Court in *Hill* endorsed the reasoning of a Seventh Circuit decision rejecting a *Strickland* claim where it was "inconceivable * * * that the defendant would have gone to trial on a defense of intoxication, or that if he had done so he either would have been acquitted, or if convicted, would nevertheless have been given a shorter sentence than he actually received." 474 U.S. at 59 (brackets omitted) (quoting *Evans* v. *Meyer*, 742 F.2d 371, 375 (7th Cir. 1984)); see *Evans*, 742 F.2d at 374-375. And on the facts of *Hill* itself, which involved a defendant's claim that he was misinformed about parole eligibility, the Court emphasized the absence of evidence that the defendant would reasonably have viewed trial as a better option than pleading guilty. See *Hill*, 474 U.S. at 60. Not only had the defendant failed generally to allege that correct parole information would have led him to choose a trial (or that he had "placed particular emphasis on his parole eligibility" in making his plea decision), but the misinformation would "seem to have affected * * * his calculation" of the consequences he faced for conviction following either a plea *or* a trial. *Ibid.*

3. In *Padilla*, the Court reaffirmed the objective focus of the *Strickland* prejudice inquiry in the specific context of a claim premised on deficient advice about the removal consequences of a plea.

Padilla held that an attorney has a "duty * * * to provide her client with available advice about an issue

like deportation, and the failure to do so clearly satisfies the first prong of the *Strickland* analysis." 559 U.S. at 371 (citation and internal quotation marks omitted). The Court declined, however, to decide whether the defendant had sufficiently alleged prejudice. *Ibid.* The Court instead remanded the case—in which the defendant had "been a lawful permanent resident of the United States for more than 40 years" and "alleg[ed] that he would have insisted on going to trial if he had not received incorrect advice from his attorney"—for a full prejudice analysis. *Id.* at 359; see *id.* at 360, 374-375; see also *Padilla* v. *Commonwealth*, 381 S.W.3d 322, 323, 330 (Ky. Ct. App. 2012) (granting relief on remand to defendant in *Padilla*, following further factual development, where evidence of guilt was "strong," but "far from conclusive").

The Court explained that "to obtain relief on this type of claim, a petitioner must convince the court that a decision to reject the plea bargain would have been rational under the circumstances." *Padilla*, 559 U.S. at 372. The Court emphasized that proper application of that standard would help to prevent a "flood" of litigation seeking to unravel guilty pleas on the ground that the defendant had not received correct immigration advice. *Id.* at 371; *id.* at 371-372. "Surmounting *Strickland*'s high bar," the Court cautioned, "is never an easy task," and "it is often quite difficult for [defendants] who have acknowledged their guilt to satisfy *Strickland*'s prejudice prong." *Id.* at 371 & n.12.

4. In prescribing an objective approach to prejudice in cases involving deficient advice about the immigration consequences of a plea, the Court in *Padilla* cited its prior decision in *Roe* v. *Flores-Ortega*, 528 U.S. 470 (2000). *Padilla*, 559 U.S. at 372. In *Flores-*

Ortega, the Court applied *Strickland* to a defendant's claim that "counsel was constitutionally ineffective for failing to file a notice of appeal." 528 U.S. at 477. The prejudice inquiry in *Flores-Ortega* "mirror[ed] the prejudice inquiry applied in" *Hill*, requiring the defendant to "demonstrate * * * a reasonable probability that, but for counsel's deficient failure to consult with him about an appeal, he would have timely appealed." *Id.* at 484, 485. As in other contexts, the Court required that such a demonstration of prejudice have an objective basis. See *id.* at 486.

The Court anticipated that a defendant would typically demonstrate prejudice in that circumstance by showing that he had objectively "nonfrivolous grounds for appeal." *Flores-Ortega*, 528 U.S. at 486. The Court, however, deemed it "unfair to *require* an indigent, perhaps *pro se*, defendant to demonstrate that his hypothetical appeal might have had merit before any advocate has ever reviewed the record in his case." *Ibid.* It accordingly declined to "foreclose the possibility" that a defendant might show prejudice by identifying "other substantial reasons to believe that he would have appealed." *Ibid.* To show that he would in fact have pursued an appeal, however, a defendant cannot rely solely on "evidence that he sufficiently demonstrated to counsel his *interest* in an appeal." *Ibid.* (emphasis added). Such evidence of subjective interest "alone is insufficient to establish that, had the defendant received reasonable advice from counsel about the appeal, he would have instructed his counsel to file an appeal." *Ibid.* Rather, as *Padilla* confirms, the defendant must show that his decision would have been objectively "rational under the circumstances."

559 U.S. at 372 (citing *Flores-Ortega*, 528 U.S. at 480, 486).

5. More recent decisions addressing ineffective assistance claims in the context of plea bargaining have maintained the prejudice inquiry's focus on the objective viability of the opportunity the defendant claims to have lost. In *Lafler* v. *Cooper*, 566 U.S. 156 (2012), for example, the defendant claimed that his attorney's misadvice had caused him to pass up a plea offer and opt for trial (the converse of the situation in *Hill* and *Padilla*). *Id.* at 160-161. The Court held that the prejudice inquiry required the defendant to show, *inter alia*, "that the conviction or sentence, or both, under the offer's terms would have been less severe than under the judgment and sentence that in fact were imposed." *Id.* at 164. Similarly, in *Missouri* v. *Frye*, *supra*, the defendant claimed that his attorney had failed to inform him of a plea offer, leading him to plead guilty later on less favorable terms. See 566 U.S. at 138-139. The Court held that the prejudice inquiry required the defendant to show, *inter alia*, "a reasonable probability that," but for counsel's deficiencies, he would have accepted the plea offer, and "the end result of the criminal process would have been more favorable by reason of a plea to a lesser charge or a sentence of less prison time." *Id.* at 147.

B. Granting *Strickland* Relief To A Defendant Who Lacked A Realistic Litigation Alternative Would Be Unsound

The Court's consistent requirement to show deprivation of an objectively realistic strategy as a prerequisite for *Strickland* relief makes both legal and practical sense.

1. The prejudice inquiry is founded on the principle that only attorney errors that affect the outcome should be grounds for relief. "An error by counsel, even if professionally unreasonable, does not warrant setting aside the judgment of a criminal proceeding if the error had no effect on the judgment." *Strickland*, 466 U.S. at 691. A claim of ineffective assistance thus requires a showing that the defendant "los[t] benefits he would have received in the ordinary course but for counsel's ineffective assistance." *Cooper*, 566 U.S. at 169. A defendant who cannot show a reasonable likelihood that he is worse off—or a defendant who, by all objective measures, is *better* off—because of how his case turned out has no grounds for vacating his conviction.

This Court has cautioned that "[c]ases involving Sixth Amendment deprivations," no less than cases involving other constitutional rights, "are subject to the general rule that remedies should be tailored to the injury suffered from the constitutional violation and should not unnecessarily infringe on competing interests." *United States* v. *Morrison*, 449 U.S. 361, 364 (1981). Granting *Strickland* relief to a defendant who has lost nothing of objective value would infringe, entirely unnecessarily, on an interest that *Strickland* identified as one of "profound importance"—the interest in "finality in criminal proceedings." 466 U.S. at 693-694. As the Court has explained, "[e]very inroad on the concept of finality undermines confidence in the integrity of our procedures; and, by increasing the volume of judicial work, inevitably delays and impairs the orderly administration of justice." *United States* v. *Timmreck*, 441 U.S. 780, 784 (1979) (citation omitted); see, *e.g.*, *Hill*, 474 U.S. at 58. *Strickland*-based

attacks on a criminal judgment are therefore limited to attorney errors that affected the outcome, not solely the process, of a criminal proceeding.[2]

The interest in finality "has special force with respect to convictions based on guilty pleas." *Timmreck*, 441 U.S. at 784; see, *e.g.*, *Bousley* v. *United States*, 523 U.S. 614, 621 (1998). The "substantial burden on the claimant to show ineffective assistance" in the context of a guilty plea reflects the Court's recognition that the "plea process brings to the criminal justice system a stability and a certainty that must not be undermined by the prospect of collateral challenges." *Premo* v. *Moore*, 562 U.S. 115, 132 (2011). That is especially the case because guilty pleas account for the "vast majority of criminal convictions," yet "rarely" give rise to "concern that unfair procedures may have resulted in the conviction of an innocent defendant." *Hill*, 474 U.S. at 58 (citation omitted). As the Court has recognized, a "counseled plea of guilty is an admission of factual guilt so reliable that, where voluntary and intelligent, it quite validly removes the issue of factual guilt from the case." *Menna* v. *New York*, 423 U.S. 61, 62 n.2 (1975) (per curiam) (emphasis omitted). Such an admission should not be lightly set aside when only its strategic wisdom, and not its reliability, has been questioned. See, *e.g.*, *Moore*, 562 U.S. at 132; *Hill*, 474 U.S. at 58-60. And when either a plea or trial will produce the same undesired consequence, not even its strategic wisdom can be challenged.

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[2] In *Weaver* v. *Massachusetts*, No. 16-240 (oral argument scheduled for Apr. 19, 2017), this Court is considering whether deficient attorney performance that results in a structural error must also show actual prejudice. No claim of that sort exists in this case.

2. Concerns about undermining the finality of guilty pleas are particularly significant in challenges to a plea based on misadvice about removal. The immigration consequences of a conviction apply equally to conviction following a plea *or* a trial. Deficient attorney advice about immigration consequences, therefore, does not imply that a competent attorney would have recommended that the defendant reject a favorable plea offer. See *Hill*, 474 U.S. at 59 (focusing on whether competent attorney would have advised defendant to go to trial). As the Court observed in *Strickland* and reiterated in *Padilla*, "attorney errors are as likely to be utterly harmless in a particular case as they are to be prejudicial." *Padilla*, 559 U.S. at 371-372 (brackets and ellipses omitted) (quoting *Strickland*, 466 U.S. at 693). That is especially true where the circumstances of the case provide the defendant with no viable path to avoid an undesired consequence of conviction.

Accordingly, a *Padilla* claimant must show that he had an objectively realistic reason to reject a plea offer. Otherwise, any defendant who credibly claims that he placed the highest priority on remaining in the United States would automatically establish prejudice under *Strickland* solely because of the lost opportunity to "throw 'a Hail Mary' at trial." Pet. App. 4a. That would undermine *Padilla*'s reassurance that a rigorous prejudice requirement would protect against a proliferation of immigration-advice-based collateral attacks. See 559 U.S. at 371-372. It would also contradict the underpinnings of *Strickland* because it would grant relief to a defendant who was not actually harmed by a constitutional violation. And as a practical matter, setting aside a plea in those circumstances would ultimately give the defendant either no benefit at all

(if he is tried and loses) or else a windfall benefit he does not deserve (if changed conditions allow him to avoid or prevail at a trial).

The passage of time since the original prosecution makes the risk of such a windfall benefit particularly acute. A *Padilla* claimant may bring his collateral attack long after the original plea. See, *e.g.*, *Kovacs* v. *United States*, 744 F.3d 44, 48-49 (2d Cir. 2014) (12 years); *United States* v. *Akinsade*, 686 F.3d 248, 251 (4th Cir. 2012) (nine years). By that point, the "government may find it harder to re-prosecute." Pet. App. 9a. As this Court has recognized, long gaps "may 'work to the accused's advantage' because 'witnesses may become unavailable or their memories may fade.'" *Vermont* v. *Brillon*, 556 U.S. 81, 90 (2009) (quoting *Barker* v. *Wingo*, 407 U.S. 514, 521 (1972)). Requiring a showing that the defendant could objectively have done better at the time of the original plea decision minimizes the prospect that such factors will result in the unwarranted acquittal of a defendant who has reliably admitted his guilt.

II. A *PADILLA* CLAIMANT WHO LACKS AN OBJECTIVELY VIABLE STRATEGY FOR AVOIDING REMOVAL CANNOT SHOW HE WAS PREJUDICED BY A PLEA

Petitioner errs in contending that a *Padilla* claimant with no viable defense at trial, and no evidence he could have obtained a better plea agreement, can show that he was prejudiced by accepting a plea offer with favorable sentencing terms. A defendant's hope for an irrational or unjust trial outcome, no matter how sincere, is not cognizable under *Strickland*. And this Court has never found prejudice under *Strickland* based on hypothesized plea deals that the government never offered.

A. A *Padilla* Claimant's Subjective Preference For Trial Cannot In Itself Establish That He Was Prejudiced By Accepting An Objectively Favorable Plea Offer

Petitioner contends (Br. 29) that a defendant in his position may put such a high premium on avoiding removal that he would "take[] his chances at trial" no matter how long the odds. But that subjective preference is not enough to establish a defendant's entitlement to *Strickland* relief when the defendant lacks an objectively cognizable chance of prevailing at trial.

1. A *Padilla* claimant's strong subjective desire to remain in the United States is a necessary precondition to showing prejudice from a deficiently counseled plea. See Pet. App. 2a-4a, 8a, 10a; see also *id.* at 30a, 47a. Unless the defendant has such a desire, accurate advice about immigration consequences would not cause a defendant to reject a plea that has favorable criminal consequences. In contrast, a defendant who strongly desires to remain in this country "might * * * be willing to go to trial even if he faces a low probability of success, one that might lead a citizen to accept a plea." *Id.* at 8a. But a defendant cannot "elide the difficult task of showing prejudice entirely," *id.* at 9a, by attaching dispositive weight to his subjective desire to avoid removal, in the absence of any realistic way to fulfill that desire.

Petitioner posits (*e.g.*, Br. 25) that, notwithstanding the government's ability to present overwhelming evidence of his guilt, a defendant might pass up a favorable plea offer on the hope that something random and unexpected (*e.g.*, the disappearance of a key witness) might allow him to prevail at trial. Although that choice might be characterized as "rational" (*e.g.*, Pet. Br. 2) in some sense, it cannot alone provide the basis for

Strickland relief. As *Strickland* makes clear, a defendant's reliance on "some conceivable" possibility of a more favorable trial outcome, perhaps produced by luck, happenstance, or error, "is not enough" to show prejudice under *Strickland*. 466 U.S. at 693. A defendant cannot establish that he was deprived of a "fair[] and regular[]" pretrial process, *Cooper*, 566 U.S. at 169, by claiming that he was deprived of the chance to seek a result based on "arbitrariness" or jury "'nullification'" that would itself fall outside the normal administration of justice, *Strickland*, 466 U.S. at 695.

"A defendant has no entitlement to the luck of a lawless decisionmaker," *Strickland*, 466 U.S. at 695, or undeserved luck of any other sort. The Court has rejected an approach under which "[v]irtually every act or omission of counsel would meet th[e] test" for prejudice. *Id.* at 693. Instead, the Court has required a defendant to show that the act or omission "actually had an adverse effect on the defense," *ibid.*—something a *Padilla* claimant with no objectively viable strategy for avoiding removal cannot do.

2. In arguing that subjective removal concerns should override all objective considerations of litigation strategy, petitioner effectively seeks a special *Padilla*-specific exception from the normal *Strickland* standard. *Padilla* itself disclaims any such exception, see 559 U.S. at 371-372 (explicitly invoking *Strickland*), and petitioner offers no sound basis for creating one.

As a general rule, *Strickland* prejudice principles apply whenever an attorney provides deficient advice about the direct adverse consequences of a conviction, *e.g.*, sentencing. See *Hill*, 474 U.S. at 53, 58-60 (applying *Strickland*'s outcome-based prejudice test and

denying relief to a defendant who allegedly received deficient advice about his parole-eligibility date, where the timing of parole eligibility applied equally to a conviction after trial or a plea). Petitioner's suggestion (Br. 28) that *Padilla* claimants should be viewed through a different lens because removal could hypothetically lead to death or other physical harm is misplaced. An alien who faced physical harm at the hands of his home country following conviction of an aggravated felony would (at a minimum) be eligible to seek protection under the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment Art. 3, Dec. 10, 1984, S. Treaty Doc. No. 20, 100th Cong., 2d Sess. 20 (1988), 1465 U.N.T.S. 85; 8 C.F.R. 1208.17(a). See *Moncrieffe* v. *Holder*, 133 S. Ct. 1678, 1682 n.1 (2013); see also *ibid.* (noting that withholding of removal under 8 U.S.C. 1231(b)(3) is also available for some aliens convicted of aggravated felonies).

Petitioner's proposed approach to *Padilla* claims would also lead to unjustified anomalies in *Strickland*'s application. A defendant who *rejects* a plea offer based on constitutionally deficient advice about the likely ramifications of a trial as compared to a plea cannot establish prejudice unless he shows (*inter alia*) that the consequences of the option he passed up "would have been less severe than under the judgment and sentence that in fact were imposed." *Cooper*, 566 U.S. at 164. But under petitioner's proposed approach to *Padilla* claims, a defendant who *accepts* a plea based on the same type of error (*i.e.*, constitutionally deficient advice about the likely ramifications of a trial as compared to a plea) would be able to establish prejudice without any such showing. Indeed, such a

defendant would be able to establish prejudice even where the consequences of the option he passed up would have been *more* severe than under the judgment and sentence actually imposed.

3. Petitioner proffers (Br. 26-27) two reasons why a defendant who is certain to be removed would prefer *losing* at trial, with a resulting longer prison sentence, to a plea with a shorter prison sentence. But petitioner's reasons for viewing an objectively worse outcome as a better outcome are far too insubstantial to support the special exception to *Strickland* prejudice analysis that he seeks.

First, no reasonable attorney would advise, and no reasonable defendant would choose (Br. 27), a much longer prison sentence on the vague hope that, during the extra time in prison, legislative or executive policy towards aliens convicted of aggravated felonies would change in a favorable way. It is particularly implausible that they would do so in the hope that the law might change in a way that would advantage an alien who had insisted on going to trial over one who had accepted responsibility for his crime. Cf. U.S. Dep't of Justice, *Standards for Consideration of Clemency Petitioners* § 1-2.112, https://www.justice.gov/pardon/about-office-0 (last updated Jan. 13, 2015) (attaching weight in clemency decisions to prisoner's acceptance of responsibility).

Second, it is not reasonable to presume (Br. 26-27) as a general matter that a defendant faced with removal would prefer limited prison visitation rights in the United States to freedom elsewhere. Such a presumption is especially unwarranted in the federal system, where a defendant could easily find himself incarcerated far from his family and friends. See Fed-

eral Bureau of Prisons, U.S. Dep't of Justice, *Designations*, https://www.bop.gov/inmates/custody_and_care/designations.jsp (last visited Mar. 3, 2017) (explaining that proximity considerations are limited to placement with "500 miles" of a prisoner's "release residence" and are not guaranteed).

4. Requiring a defendant to prove that a trial would have been a strategically viable alternative to pleading guilty provides a useful objective foundation for what would otherwise be an essentially subjective inquiry. Many *Padilla* claimants doubtless believe in complete good faith that they would have opted for trial had they known the immigration consequences of a plea. But hindsight bias and other factors can potentially obscure efforts of defendants and their attorneys to reconstruct their decisionmaking processes years after the fact. And petitioner's position "would provide those in [his] position with a ready-made means of vacating their convictions *whenever* they can show that counsel failed to adequately explain deportation consequences." Pet. App. 9a.

Although a defendant who challenges a guilty plea under *Strickland* is necessarily displaying his willingness to trade his plea for a trial at the time of the collateral attack, see *Padilla*, 559 U.S. at 373, that does not in itself show he would have made the same trade at the time he originally faced that decision. By the time of the collateral proceedings, the parties are no longer in their original positions, and it will be impossible to truly restore them to their former state. Not only will the government have more difficulty prosecuting the defendant long after the crime, see p. 26, *supra*, but it may be less willing to devote the resources to doing so, see Pet. App. 9a, and the de-

fendant may be in line for a shorter sentence than he would originally have received, see, *e.g.*, *Pepper* v. *United States*, 562 U.S. 476, 480-481 (2011) (holding that courts may take postsentencing rehabilitation into account on resentencing). Although those factors should not preclude a deserving defendant from obtaining *Strickland* relief, they counsel in favor of retaining the additional layer of reliability that the objectively focused *Strickland* prejudice inquiry traditionally provides.

B. A Defendant Cannot Establish *Strickland* Prejudice By Hypothesizing Theoretical Plea Deals With No Evidentiary Basis

Petitioner alternatively contends (Br. 24) that, separate and apart from any subjective desire to go to trial, a *Padilla* claimant can show prejudice by identifying "offenses with no or lesser deportation consequences to which [he] could have pled guilty for the same conduct." By "could," he apparently means an offense that *might* have provided the basis for a theoretical plea agreement, even if nothing indicates that the prosecution would have offered, or the court would have accepted, such a plea. See, *e.g.*, Br. 33 (suggesting that relief can be premised on "proposals" that a "creative defense attorney" would have asked the "prosecutor to consider"); see also Br. 31-33. Such an approach would depart sharply from anything this Court has endorsed under *Strickland*.

1. When this Court has recognized the possibility of *Strickland* relief based on the missed opportunity for a particular plea agreement, it has done so in the context of a plea agreement that the government actually offered. The prosecution in *Cooper*, for example, had offered a plea agreement under which the

defendant's recommended sentence would have been approximately three times lower than the mandatory-minimum sentence to which he was subject after trial. 566 U.S. at 161, 174. And the prosecution in *Frye* had offered, *inter alia*, a plea agreement under which the defendant would have been convicted of a misdemeanor (with 90 days in prison) rather than the felony to which he ultimately pleaded (with three years in prison). 566 U.S. at 138-139.

In both cases, the Court tied the prejudice analysis to the actual preexisting plea offer. In *Cooper*, where the defendant claimed he was prejudiced by having opted for trial based on misadvice about the offense elements, the Court required "a reasonable probability that the plea offer would have been presented to the court (*i.e.*, that the defendant would have accepted the plea and the prosecution would not have withdrawn it in light of intervening circumstances), [and] that the court would have accepted its terms." 566 U.S. at 164. And in *Frye*, where the defendant claimed that he was prejudiced by his attorney's failure to inform him about a more favorable plea offer, the Court required "a reasonable probability [the defendant] would have accepted the earlier plea offer had [he] been afforded effective assistance of counsel" and "a reasonable probability the plea would have been entered without the prosecution canceling it or the trial court refusing to accept it, if they had the authority to exercise that discretion." 566 U.S. at 147.

An approach to *Strickland* prejudice untethered from an actual plea offer—or, at least, specific evidence that the prosecution would have made a particular offer—would be inconsistent with *Cooper* and *Frye*. Under such an approach, it would not matter that the

defendant in *Cooper* received an actual plea offer that contemplated a much more favorable disposition than the one he achieved at trial. Instead, even in the absence of such a plea offer, the defendant could obtain *Strickland* relief based solely on speculation that an attorney who properly understood the elements of the offense might, in theory, have procured him a good deal.

2. Granting *Strickland* relief based solely on conjecture about counterfactual plea deals would also be at odds with this Court's decision in *Premo* v. *Moore*, *supra*. The defendant in that case alleged that his attorney deficiently failed to seek suppression of a confession before advising him to accept a plea offer. 562 U.S. at 118. This Court concluded that the defendant was not entitled to federal habeas relief. *Id.* at 118, 132-133. In reaching that conclusion, the Court rejected an approach, suggested by a lower-court judge, under which a defendant could prove *Strickland* prejudice by showing "a reasonable possibility that he would have obtained a better plea agreement but for his counsel's errors." *Id.* at 131. The Court admonished that its precedent "did not establish, much less clearly establish," such an open-ended standard. *Ibid.*

As the Court recognized in *Moore*, the "uncertainty inherent in plea negotiations" is ill-suited to judicial superintendence through *Strickland*, in the absence of a solid evidentiary basis in which to ground a court's conclusions. 562 U.S. at 129. "The art of negotiation is at least as nuanced as the art of trial advocacy," and it is one into which courts have substantially less visibility. *Id.* at 125; see *ibid.* (observing that plea negotiations are more "removed from immediate judicial

supervision" than trial strategy). As a result, "the potential for the distortions and imbalance that can inhere in a hindsight perspective may become all too real." *Ibid.* In addition, "ineffective-assistance claims that lack necessary foundation may bring instability to the very process the [ineffective-assistance] inquiry seeks to protect." *Ibid.*

That concern is magnified when a district court is asked not simply to second-guess the actions of defense counsel, but to hypothesize plea agreements that the prosecution never offered. As the Court recognized in both *Cooper* and *Frye*, "a defendant has no right to be offered a plea." *Frye*, 566 U.S. at 148 (citing *Weatherford* v. *Bursey*, 429 U.S. 545, 561 (1977)); see *Cooper*, 566 U.S. at 168. The prejudice analysis in those decisions accordingly respects prosecutorial discretion by requiring a defendant who did, in fact, receive a favorable plea offer to show a reasonable probability that the prosecution would not later have withdrawn it. See *Cooper*, 566 U.S. at 164 (requiring proof, *inter alia*, that "the prosecution would not have withdrawn [the offer] in light of intervening circumstances"); *Frye*, 566 U.S. at 151 ("If * * * the prosecutor could have canceled the plea agreement, and if Frye fails to show a reasonable probability the prosecutor would have adhered to the agreement, there is no *Strickland* prejudice."). That requirement cannot be squared with an approach under which a defendant can obtain *Strickland* relief even without evidence that prosecution would have *offered* the more favorable plea in the first place.

3. Such an approach would be as unwarranted in a case involving a *Padilla* claim as it would be in any other. As petitioner observes (Br. 19), the Court in *Padilla* noted that an attorney's ignorance of the im-

migration consequences of a conviction can hamper his ability to plea bargain effectively. See 559 U.S. at 373. But it did so solely in support of its holding that such ignorance satisfies the deficient-performance component of *Strickland*. See, *e.g.*, *id.* at 360. The Court did not suggest that such considerations would provide the basis for an automatic, or near-automatic, finding of prejudice in *Padilla* cases whenever a defendant can speculate about a possible alternative plea. As *Strickland* itself recognized, certain considerations may "affect the performance inquiry" but be "irrelevant to the prejudice inquiry." 466 U.S. at 695. And *Padilla* deficiencies are not unique in their ability to affect plea negotiations. Any number of attorney deficiencies —such as a misunderstanding about the elements of the offense, see, *e.g.*, *Cooper*, 566 U.S. at 161—could have a similar, or greater, effect.

III. PETITIONER CANNOT SHOW THAT HE HAD A STRATEGICALLY VIABLE ALTERNATIVE TO ACCEPTING THE GOVERNMENT'S PLEA OFFER

Petitioner in this case has not established that he was prejudiced by his attorney's misadvice about the removal consequences of his plea. As both courts below recognized, the record reveals that petitioner had no objectively viable strategy for avoiding removal. Had petitioner proceeded to trial, the "overwhelming" evidence against him would have led a rational jury to deliver a guilty verdict on the charged offense, after which petitioner would still have faced removal, but with a harsher prison sentence. Pet. App. 3a. And "nothing in the record" supports petitioner's legally irrelevant "speculation" that, had his attorney advised him correctly, the government would have offered him

a plea agreement with no (or reduced) immigration consequences. *Id.* at 8a.

A. Petitioner Has Not Shown A Reasonable Probability That He Could Have Achieved A Better Result By Going To Trial

Petitioner cannot establish that he was prejudiced by forgoing a trial, because the record shows that he would have been *worse* off insisting on trial than he was accepting the government's plea offer. As both the district court and the court of appeals recognized, trial was a losing proposition for petitioner. See Pet. App. 3a, 45a-47a. Petitioner had "no rational defense to the charge and no realistic prospect of avoiding conviction and deportation." *Id.* at 47a. Rather, "[i]n light of the overwhelming evidence of [his] guilt, a decision to take the case to trial would have almost certainly resulted in a guilty verdict, a significantly longer prison sentence, and subsequent deportation." *Id.* at 46a; see *id.* at 3a (accepting district court's conclusion under clear-error standard of review). Petitioner provides no basis for concluding otherwise.

1. The search of petitioner's townhouse alone produced compelling evidence that petitioner possessed drugs with intent to distribute them (and did distribute them to friends), in violation of 21 U.S.C. 841(a)(1). That search uncovered, *inter alia*, 88 ecstasy pills (an amount that government witnesses would have testified to be inconsistent with personal use), $32,432 in cash, and a loaded rifle. Pet. App. 14a; see J.A. 109. Expert witnesses would have testified that petitioner's activities were consistent with "the drug trafficking modus operandi." J.A. 79-80; see J.A. 109. And in the wake of the search, petitioner, after receiving *Miranda* warnings, admitted that "[a]ll of the narcotics"

were his and that he "gave * * * away" ecstasy to friends, J.A. 75, thereby conceding all the necessary elements of the Section 841(a)(1) offense, see pp. 3-4, *supra*.

Although petitioner briefly suggests (Br. 30) that he might have improved his odds at trial by challenging the search warrant, he had no plausible grounds for doing so. See Pet. App. 45a ("At the evidentiary hearing, [petitioner's] attorney testified that there did not appear to be a valid motion to suppress."). The probable cause for the warrant was supported by a controlled drug purchase from petitioner by a confidential informant under the observation of federal agents. J.A. 217; see Pet. App. 13a-14a. Petitioner's attorney had performed a "thorough analysis" of the warrant, J.A. 241, "didn't think [it] was defective," J.A. 216, and "th[ought] [the agents] had probable cause to search," *ibid.*

The evidence from the search represented only the surface of the iceberg. The government had ample additional evidence against petitioner. First, the government could have presented evidence about "the sales to the confidential informant." Pet. App. 45a. The informant had told authorities about purchasing roughly 200 ecstasy pills from petitioner over the course of eight years. *Id.* at 12a-13a. The informant had also carried out a controlled drug purchase from petitioner at his home, under the surveillance of federal agents, which had involved the exchange of $300 for 15 ecstasy pills. *Id.* at 13a. Second, even the witnesses petitioner himself proposed to present would have bolstered the government's case. They would, by petitioner's own admission, have testified that petitioner "may party using ecstasy and give it away to friends,"

J.A. 180—*i.e.*, that he possessed ecstasy and distributed it. And the government could have called those witnesses to testify even if petitioner did not.

2. Petitioner testified at the evidentiary hearing that, had he known the immigration consequences of his plea, he would have gone to trial with what he viewed as "strong evidence" of his innocence. J.A. 180. He had no such evidence.

Petitioner's attorney viewed the only "colorable defense at trial" to be an argument "that the pills that were found were intended for personal use." Pet. App. 45a; see J.A. 218. Even that, he acknowledged, would be "difficult"; the attorney did not "know how we get that pas[t] the jury." J.A. 218. That may be a considerable understatement of the obstacles a personal-use defense would have encountered.

As both lower courts recognized, a personal-use defense would have been untenable in light of the amount of drugs, the sales to the confidential informant, and the admitted distribution to friends. See Pet. App. 10a, 45a. Furthermore, it is unclear how petitioner could have presented any affirmative evidence to support such a defense. Had he taken the stand to testify that the drugs were for personal use, he would have been impeached by his prior admission during his proffer session with the government that he in fact sold drugs for money. J.A. 223, 231-232, 238.

Petitioner suggests (Br. 35) in passing that more investigation by his attorney might have uncovered other defenses. But he fails even now to identify any realistic way in which his position might have improved. Indeed, it is just as likely—if not substantially more likely—that the government's case would have grown stronger, rather than weaker, as trial ap-

proached. See, *e.g.*, *Moore*, 562 U.S. at 129 ("Had the prosecution continued to investigate, its case might well have become stronger."); *id.* at 124. For example, given petitioner's eight-year history of drug distribution, the government would likely have found more fact witnesses who could have undermined petitioner's personal-use defense and corroborated the already insurmountable evidence of petitioner's guilt.

3. Petitioner has asserted—consistent with the evidence of his close ties to this country and his focus on removal in his original evaluation of the government's plea offer, see, *e.g.*, Pet. App. 2a-4a, 30a—that had he known the removal consequences of his plea, he would have insisted on a trial regardless of his chances of prevailing. But because such insistence would have been counterproductive, forgoing that option did not prejudice him.

Petitioner clearly had a powerful desire not to be removed from the United States for his drug-dealing activities. But going to trial was not a cognizable way to avoid that result. "The problem for [petitioner] is that he has no *bona fide* defense, not even a weak one," Pet. App. 10a, and "deportation would have followed just as readily from a jury conviction as from a guilty plea," *id.* at 3a. Given the profusion of evidence against him, his only real choice was between conviction by plea, with a shorter prison term, or conviction by trial, with a longer prison term. "[A]side from the off chance of jury nullification or the like, [petitioner] stood to gain nothing from going to trial but more prison time." *Ibid.*; see *id.* at 46a (district court observing that petitioner's plea "appears to have greatly reduced [his] sentence"); see also J.A. 239 (petitioner's attorney acknowledging that petitioner's sentence

would likely have been higher had he gone to trial); see also p. 6, *supra* (Guidelines calculations).

Petitioner's hope (*e.g.*, Br. 30) that the jury would disregard overwhelming evidence of guilt, or that the government's case would fortuitously fall apart, is not a valid basis for finding *Strickland* prejudice. As previously discussed, see pp. 16-22, *supra*, the prejudice inquiry requires that "predictions of the outcome at a possible trial, where necessary, should be made objectively." *Hill*, 474 U.S. at 59-60. Such objectivity does not allow consideration of any "arbitrariness" or "luck" that might have led to an undeserved result. *Strickland*, 466 U.S. at 695.[3]

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[3] To the extent petitioner suggests (Br. 28-29) that he was prejudiced because he would have *preferred* a longer prison sentence, that suggestion is misplaced. Even if such an argument were cognizable under *Strickland* (but see pp. 30-31, *supra*), petitioner did not advance it the in the court of appeals, see Pet. C.A. Br. 35-39, and he makes no attempt to tie it to any preferences he expressed at the evidentiary hearing, see J.A. 180 (claim by petitioner that he would have gone to trial with his "strong evidence"); cf. *Hill*, 474 U.S. at 60 (rejecting ineffective-assistance claim where defendant "failed to allege the kind of 'prejudice' necessary to satisfy" *Strickland*). And contrary to his suggestion (Br. 28-29), his lengthy period of immigration detention during the current postconviction proceedings—which appears to be the product of a belief that those proceedings may enable him to avoid removal altogether, see J.A. 181-182 (describing Korean authorities' unwillingness to issue a travel document because of the harsh impact of deportation on him and perceived chances of having his plea set aside)—does not demonstrate that he would have preferred a longer prison sentence if removal were unavoidable.

B. Petitioner's Speculation About Alternative Plea Offers Provides No Basis For *Strickland* Relief

Petitioner's argument in the court of appeals (and at the evidentiary hearing) was limited to the contention that, had he known the immigration consequences of his plea, he would have elected to go to trial. See Pet. C.A. Br. 35-39; see also J.A. 157. His argument in this Court, however, relies extensively on the supposition that, had he known that a conviction for drug distribution required removal, he might have obtained a plea deal that would have avoided that consequence. Even assuming this Court's precedents would allow for *Strickland* relief based on a plea offer that the prosecution never made, see pp. 32-36, *supra*, such relief is unwarranted here. Petitioner's "sheer speculation" about possible alternative plea deals, Pet. App. 8a, falls well short of establishing the requisite "reasonable probability" of a different outcome, *Strickland*, 466 U.S. at 694.

1. The government offered (and petitioner accepted) a plea bargain under which petitioner would plead guilty to an offense, defined as an aggravated felony, that he had admitted to committing, in exchange for "tangible" sentencing benefits. Pet. App. 46a. Nothing in the record suggests that the government was unaware of the removal consequences of that plea or that it might have been inclined to allow petitioner to escape them.

As the sentencing proceedings illustrate, although the government recognized that petitioner had no criminal history and was a successful restauranteur, it viewed petitioner as having committed "a serious offense." J.A. 122; see J.A. 122-123. The government emphasized to the district court that petitioner had

been engaged in "narcotics dealing since January of 2001"; that the confidential informant had purchased "200 ecstasy pills * * * between January of 2001 and December of 2008"; and that when agents searched petitioner's townhouse, "88 ecstasy pills were recovered at that time alone." J.A. 123; see *ibid.* (prosecutor stressing that petitioner's drug dealing had "been ongoing for quite some[ ]time"). The government accordingly sought a sentence of 24 months of imprisonment. See J.A. 119, 124.

Thus, the government not only charged petitioner with a felony drug offense for which any conviction (regardless of the sentence) would result in his removal, see p. 5, *supra*, but it favored a sentence commensurate with the seriousness of that offense. Accordingly, as the court of appeals recognized, "nothing in the record * * * indicat[es] that" the government "might have agreed to allow [petitioner] to plead guilty to a non-deportable offense if his attorney had pursued the matter." Pet. App. 7a-8a.

2. The government had no obligation to make any plea offer, let alone a specific one that petitioner might have preferred. See, *e.g.*, *Cooper*, 566 U.S. at 168; *Frye*, 566 U.S. at 148. As a matter of practice, federal prosecutors are advised to "weigh all relevant considerations" in deciding "whether it would be appropriate to enter into a plea agreement," including the "nature and seriousness of the offense or offenses charged" and the "likelihood of obtaining a conviction at trial." U.S. Dep't of Justice, *U.S. Attorneys' Manual* § 9-27.420(A) (USAM), https://www.justice.gov/usam/united-states-attorneys-manual (last updated Jan. 2017). As petitioner points out (Br. 23), another consideration is the "probable sentence or other consequences if

the defendant is convicted." USAM § 9-27.420(A). But that consideration could cut either way and will not necessarily favor the defendant. And nothing in the *U.S. Attorneys' Manual* or any other federal guidance document requires federal prosecutors to make efforts to avoid the congressionally prescribed removal of aliens who have committed aggravated felonies. See 8 U.S.C. 1227(a)(2)(A)(iii).

Petitioner's extensive list (Br. 31-33) of hypothetical alternative plea deals illustrates the myriad flaws of his conjectural approach to *Strickland* prejudice. To begin with, each of the hypothetical plea deals on petitioner's list is more favorable to him on *every* dimension than the plea deal he was actually offered. Each would involve a plea to a less serious offense, a disposition under which he would serve less (or no) time in prison, or both. They would, therefore, not be creative alternative plea deals that would satisfy the interests of both parties, see *Padilla*, 559 U.S. at 373, but instead unilateral concessions by the government. Nothing suggests that the government, which sought a drug-distribution conviction and a two-year sentence, would have been satisfied with any of the more lenient dispositions that petitioner hypothesizes. Cf. *Cooper*, 566 U.S. at 167 (observing that the defendant there sought to restore "a plea offer for a sentence the prosecution evidently deemed consistent with the sound administration of criminal justice").

Relatedly, all of the dispositions hypothesized by petitioner are ones that *any* defendant, not just an alien, would have preferred. That is a byproduct of the general (and sensible) correlation between the removability consequence of an offense and the severity of the sentence for that offense, both of which re-

flect a congressional judgment about the gravity of the crime. See 8 U.S.C. 1101(a)(43); see also H.R. Rep. No. 22, 104th Cong., 1st Sess. 8 (1995) (explaining that aliens who "clearly demonstrate a disregard for this nation's laws * * * have no legitimate claim to remain in the United States"). Congress's judgment that an alien who commits a serious offense should be subject *both* to a higher sentence *and* to removal is not a reason to favor such aliens in the *Strickland* prejudice analysis. It would invert congressional policy to presume that, precisely because Congress has prescribed removal in addition to prison for an alien drug dealer, an alien defendant is more likely than a similarly situated U.S. citizen defendant to receive (or more deserving than a U.S. citizen defendant of) an offer to plead his conduct down.

Furthermore, many of petitioner's speculative pleas are considerably far afield of the facts underlying the drug-distribution charge in this case. It is far from evident why the government would have been inclined to characterize petitioner's eight-year history of drug dealing as an accessory-after-the-fact, misprision-of-felony, or misdemeanor tax offense. See Pet. Br. 22, 32. And it is not even clear that a factual basis existed for petitioner to plead guilty to all those crimes, rather than the drug-dealing offense that he admitted to committing. See Fed. R. Crim. P. 11(b)(3) ("Before entering judgment on a guilty plea, the court must determine that there is a factual basis for the plea."); *Cooper*, 566 U.S. at 164 (requiring proof that court would accept plea); *Frye*, 566 U.S. at 147 (same). Accordingly, petitioner's after-the-fact hypothetical better plea deal—like his after-the-fact preference for a trial that would realistically lead only to conviction, removal,

and a harsher sentence—fails to establish *Strickland* prejudice.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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APPENDIX

1. U.S. Const. Amend. VI provides:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

2. 8 U.S.C. 1101(a)(43)(B) provides:

Definitions

(a) As used in this chapter—

(43) The term "aggravated felony" means—

(B) illicit trafficking in a controlled substance (as defined in section 802 of title 21), including a drug trafficking crime (as defined in section 924(c) of title 18);

3. 8 U.S.C. 1158 provides in pertinent part:

Asylum

* * * * *

(b) Conditions for granting asylum

* * * * *

(2) Exceptions

(A) In general

Paragraph (1) shall not apply to an alien if the Attorney General determines that—

* * * * *

(ii) the alien, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of the United States;

* * * * *

(B) Special rules

(i) Conviction of aggravated felony

For purposes of clause (ii) of subparagraph (A), an alien who has been convicted of an aggravated felony shall be considered to have been convicted of a particularly serious crime.

4. 8 U.S.C. 1227(a)(2)(A)(iii) provides:

Deportable aliens

(a) Classes of deportable aliens

Any alien (including an alien crewman) in and admitted to the United States shall, upon the order of the Attorney General, be removed if the alien is within one or more of the following classes of deportable aliens:

(2) Criminal offenses

(A) General crimes

(iii) Aggravated felony

Any alien who is convicted of an aggravated felony at any time after admission is deportable.

5. 8 U.S.C. 1229b(a)(3) provides:

Cancellation of removal; adjustment of status

(a) Cancellation of removal for certain permanent residents

The Attorney General may cancel removal in the case of an alien who is inadmissible or deportable from the United States if the alien—

(3) has not been convicted of any aggravated felony.

6. 18 U.S.C. 924(c)(2) provides:

Penalties

(2) For purposes of this subsection, the term "drug trafficking crime" means any felony punishable under the Controlled Substances Act (21 U.S.C. 801 et seq.), the Controlled Substances Import and Export Act (21 U.S.C. 951 et seq.), or chapter 705 of title 46.

7. 21 U.S.C. 841 provides in pertinent part:

Prohibited acts A

(a) Unlawful acts

Except as authorized by this subchapter, it shall be unlawful for any person knowingly or intentionally—

(1) to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance; or

(2) to create, distribute, or dispense, or possess with intent to distribute or dispense, a counterfeit substance.

(b) Penalties

Except as otherwise provided in section 849, 859, 860, or 861 of this title, any person who violates subsection (a) of this section shall be sentenced as follows:

* * * * *

(C) In the case of a controlled substance in schedule I or II, gamma hydroxybutyric acid (including when scheduled as an approved drug product for purposes of section 3(a)(1)(B) of the Hillory J. Farias and Saman-

tha Reid Date-Rape Drug Prohibition Act of 2000), or 1 gram of flunitrazepam, except as provided in subparagraphs (A), (B), and (D), such person shall be sentenced to a term of imprisonment of not more than 20 years and if death or serious bodily injury results from the use of such substance shall be sentenced to a term of imprisonment of not less than twenty years or more than life, a fine not to exceed the greater of that authorized in accordance with the provisions of title 18 or $1,000,000 if the defendant is an individual or $5,000,000 if the defendant is other than an individual, or both. If any person commits such a violation after a prior conviction for a felony drug offense has become final, such person shall be sentenced to a term of imprisonment of not more than 30 years and if death or serious bodily injury results from the use of such substance shall be sentenced to life imprisonment, a fine not to exceed the greater of twice that authorized in accordance with the provisions of title 18 or $2,000,000 if the defendant is an individual or $10,000,000 if the defendant is other than an individual, or both. Notwithstanding section 3583 of title 18, any sentence imposing a term of imprisonment under this paragraph shall, in the absence of such a prior conviction, impose a term of supervised release of at least 3 years in addition to such term of imprisonment and shall, if there was such a prior conviction, impose a term of supervised release of at least 6 years in addition to such term of imprisonment. Notwithstanding any other provision of law, the court shall not place on probation or suspend the sentence of any person sentenced under the provisions of this subparagraph which provide for a mandatory term of imprisonment if death or serious bodily injury re-

sults, nor shall a person so sentenced be eligible for parole during the term of such a sentence.

* * * * *

RECORD
AND
BRIEFS

No. 16-327

IN THE

Supreme Court of the United States

JAE LEE, *Petitioner*,

v.

UNITED STATES OF AMERICA, *Respondent*.

On Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

INTRODUCTION 1

REPLY ARGUMENT 3

I. *Strickland* prejudice at the plea stage does not depend exclusively on a defendant's odds of prevailing at trial 3

II. There are numerous reasons why a defendant would rationally reject a plea to take his chances at trial 7

III. There are also numerous reasons why a defendant would rationally reject a plea and take his chances at obtaining a different plea, one with lesser immigration consequences 13

CONCLUSION 19

TABLE OF AUTHORITIES

Page(s)

Cases

DeBartolo v. *United States*,
790 F.3d 775 (7th Cir. 2015) 7

Delgadillo v. *Carmichael*,
332 U.S. 388 (1947) 5

Gonzales v. *United States*,
722 F.3d 118 (2d Cir. 2013) 13

Hill v. *Lockhart*,
474 U.S. 52 (1985) 1, 3, 4, 6

In re C-V-T,
22 I&N Dec. 7 (BIA, 1998) 11

INS v. *St. Cyr*,
533 U.S. 289 (2001) 13

Lafler v. *Cooper*,
566 U.S. 156 (2012) 13, 14

Miller UK Ltd. v. *Caterpillar, Inc.*,
17 F. Supp. 3d 711 (N.D. Ill. 2014) 9

Missouri v. *Frye*,
566 U.S. 134 (2012) 13, 14

Padilla v. *Kentucky*,
559 U.S. 356 (2010) ..... passim

Pilla v. *United States*,
668 F.3d 368 (6th Cir. 2012 2

Premo v. *Moore*,
562 U.S. 115 (2011) 13, 14

Roe v. *Flores-Ortega*,
528 U.S. 470 (2000) 4

TABLE OF AUTHORITIES—Continued

Page(s)

State v. *Sandoval*,
249 P.3d 1015 (Wash. 2011) 7

Strickland v. *Washington*,
466 U.S. 668 (1984) ..... passim

United States v. *Blueford*,
312 F.3d 962 (9th Cir. 2002) 10

United States v. *Hardy*,
586 F.3d 1040 (6th Cir. 2009) 10

United States v. *James*,
495 F.2d 434 (5th Cir. 1974) 10

United States v. *Mando*,
No. 3:06-cr-00018-1 (M.D. Tenn.) 16

United States v. *Rodriguez-Vega*,
797 F.3d 781 (9th Cir. 2015) 6

Statutes

8 U.S.C. § 1229b 11, 18

18 U.S.C. § 3 17

18 U.S.C. § 4 ..... 15, 17

18 U.S.C. § 1001 ..... 15, 17

18 U.S.C. § 2113 16

18 U.S.C. § 3553 17

18 U.S.C. § 3624 16

21 U.S.C. § 952 15

21 U.S.C. § 960 15

28 U.S.C. § 2255 11

TABLE OF AUTHORITIES—Continued

Page(s)

Rules

Fed. R. Crim. P. 16 10

INTRODUCTION

Mr. Lee's counsel erroneously advised Mr. Lee he would not be deported for accepting the government's plea offer. Had Mr. Lee understood that accepting the plea would actually result in his permanent banishment from the United States, no one seriously doubts Lee would have directed his counsel to seek a different plea, or else proceed with trial. Counsel's deficient advice deprived Mr. Lee of that choice, which is exactly what *Padilla* sought to avoid. Yet, the government sees nothing wrong with that result.

The main problem with the government's view is that it conflates the prejudice standard for deficient advice at trial with the standard at the plea stage. U.S. Br. 16–32. When counsel's trial performance is deficient, a defendant must show that performance "prejudiced the defense." *Strickland* v. *Washington*, 466 U.S. 668, 687 (1984). But when deficient advice affects the acceptance of a plea, the inquiry changes: a defendant must "show that there is a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial." *Hill* v. *Lockhart*, 474 U.S. 59 (1985). In other words, the defendant "must convince the court that a decision to reject the plea bargain would have been rational under the circumstances." *Padilla* v. *Kentucky*, 559 U.S. 356, 372 (2010).

To make that evaluation, a court considers the "totality of the evidence." *Strickland*, 466 U.S. at 695–96. And all the relevant evidence here—including Mr. Lee's longtime familial and business ties to this country—shows there is not just a reasonable probability but a virtual certainty that, but for his counsel's errors, Lee would not have accepted the government's plea offer. Lee Br. 29–36.

The Sixth Circuit erred by reducing the totality-of-the-circumstances analysis to a single factor: the strength of the government's evidence. Pet. App. 4a (quoting *Pilla* v. *United States*, 668 F.3d 368, 373 (6th Cir. 2012) ("[N]o rational defendant charged with a deportable offense and facing 'overwhelming evidence' of guilt would proceed to trial rather than take a plea deal with a shorter prison sentence.")). The government makes the same error. *E.g.*, U.S. Br. 12 ("A defendant cannot establish prejudice from deficient advice about the immigration consequences of a guilty plea when overwhelming evidence makes a favorable *trial* outcome unrealistic . . . .") (emphasis added).

The reality is that a defendant will sometimes rationally reject a plea offer no matter the odds of prevailing at trial—consider the defendant who faces certain death if a plea results in mandatory deportation. In other situations, a defendant will rationally *accept* a plea offer no matters the odds of prevailing at trial—consider a legal permanent resident with longtime ties to the U.S. who is offered a modest sentence in exchange for no risk of deportation. The strength of the government's evidence is just one factor of many that a defendant rationally considers before deciding to accept a plea.

Accordingly, this Court should reject the Sixth Circuit's categorical test and affirm the government's initial *Strickland* assessment in this case: Mr. Lee was prejudiced by his attorney's ineffective assistance because he "*would not have pleaded guilty*" but for his attorney's backwards advice about the deportation consequences of his plea. Lee Br. 14 (citation omitted, emphasis added). The court of appeals should be reversed.

REPLY ARGUMENT

I. *Strickland* prejudice at the plea stage does not depend exclusively on a defendant's odds of prevailing at trial.

The government cites *Strickland* and argues that a defendant can only show prejudice where "attorney error adversely affected a viable defense strategy." U.S. Br. 16. That is true when attorney error relates to the substantive trial defense, *e.g.*, a decision not to call a witness or pursue a certain defense strategy. In that context, a defendant demonstrates prejudice by showing that counsel's deficient performance changed "the result of the proceeding." *Strickland*, 466 U.S. at 694. That is because counsel's misadvice "does not warrant setting aside the judgment of a criminal proceeding if the error had no effect *on the judgment*." *Id.* at 691 (emphasis added).

In *Hill*, this Court clarified the *Strickland* standard for ineffective assistance at the plea stage. The first prong, regarding attorney performance, remains the same. *Hill*, 474 U.S. at 59. "The second, or 'prejudice,' requirement, on the other hand, focuses on whether counsel's constitutionally ineffective performance affected the outcome of the plea process." *Ibid.* "In other words, in order to satisfy the 'prejudice' requirement, the defendant must show that *there is a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial*." *Ibid.* (emphasis added).

The petitioner in *Hill* was unable to show prejudice based on his attorney's erroneous advice about the petitioner's parole eligibility date. *Id.* at 60. That outcome had nothing to do with the petitioner's

inability to prove that misadvice adversely affected a viable defense strategy. Contra U.S. Br. 16–26; Ala. *Amici* Br. 5–10. The petitioner could not show prejudice because he failed to allege "that, had counsel correctly informed him about his parole eligibility date, he would have pleaded not guilty and insisted on going to trial." *Hill*, 474 U.S. at 60. The petitioner "alleged no special circumstances that might support the conclusion that he placed particular emphasis on his parole eligibility in deciding whether or not to plead guilty." *Ibid*

Here, the objective evidence shows that deportation consequences were critical to any decision to plead guilty. Pet. App. 56a; J.A. 132. In fact, Mr. Lee's attorney understood that his erroneous advice was not just influential, but dispositive; had Mr. Lee known a guilty plea would result in deportation, the attorney testified, Lee would have chosen to go to trial, and the attorney *would have advised him to do so*. Pet. App. 56a; J.A. 244.

This Court in *Padilla* reiterated the plea-stage prejudice standard established in *Hill*. Rejecting the government's concerns about finality and opening the "floodgates" of ineffective-assistance claims, the Court emphasized that a petitioner misadvised about deportation consequences at the plea stage "must convince the court that a decision to reject the plea bargain would have been rational under the circumstances." *Padilla*, 559 U.S. at 372 (citing *Roe* v. *Flores-Ortega*, 528 U.S. 470, 480, 486 (2000)). Noting that pleas account "for nearly 95% of all criminal convictions," the Court observed that "informed consideration of possible deportation can only benefit *both* the State and noncitizen defendants during the plea-bargaining process." *Id.* at 373 (emphasis

added). And the Court confirmed that the "severity of deportation—'the equivalent of banishment or exile,'—only underscores how critical it is for counsel to [correctly] inform her noncitizen client" about deportation consequences. *Id.* at 373–74 (quoting *Delgadillo* v. *Carmichael*, 332 U.S. 388, 390–91 (1947)). As the government acknowledged at the *Padilla* oral argument, when a lawyer provides deportation misadvice, he "has used his professional skills to undermine a personal decision that belongs to the defendant alone." *Padilla* v. *Kentucky*, 559 U.S. 356 (2010), 10/13/09 Oral Arg. Tr., p. 24.

In his *Padilla* concurrence, Justice Alito emphasized the relationship between plea-stage prejudice and an attorney's affirmative misadvice regarding a conviction's removal consequences. "[I]ncompetent advice distorts the defendant's decisionmaking process and seems to call the fairness and integrity of the criminal proceeding itself into question." *Padilla*, 559 U.S. at 385 (Alito, J., dissenting) (citation omitted). "When a defendant opts to plead guilty without definitive information concerning the likely effects of the plea, the defendant car. fairly be said to assume the risk." *Ibid.* But "[t]hat is not the case when a defendant bases the decision to plead guilty on counsel's express misrepresentation that the defendant will not be removable." *Ibid.* Then, "it seems hard to say that the plea was entered with the advice of constitutionally competent counsel—*or that it embodies a voluntary and intelligent decision to forsake constitutional rights.*" *Id.* at 385–86 (emphasis added). In other words, the yardstick for evaluating prejudice in the context of an accepted plea based on affirmative misadvice is whether the process resulted in the defendant's knowing waiver of his constitutional right to trial.

Nothing in *Strickland*, *Hill*, or *Padilla* suggests that this objective, plea-stage prejudice inquiry allows a defendant to show prejudice simply by asserting that, but for his counsel's ineffective assistance, he would have chosen trial. Contra U.S. Br. 18. Nor do severe deportation consequences mean a defendant misadvised about those consequences can *per se* establish prejudice. Contra U.S. Br. 25; Ala. *Amici* Br. 4. Consider a defendant who is a brand new legal permanent resident. Assume he is offered a plea that will result in a significantly reduced incarceration period, and assume further that all of his significant familial and financial ties are to his country of origin rather than the United States. Even if the defendant's attorney misadvises him about the deportation consequences of the plea, it is not possible to say that it was reasonably probable that, but for the misadvice, the defendant would have rejected the plea.

In other situations, objective evidence of a defendant's connections to the United States will be a significant factor in the prejudice inquiry. *E.g.*, *United States* v. *Rodriguez-Vega*, 797 F.3d 781, 785 (9th Cir. 2015). That is why courts consider the totality of the circumstances. And as explained in Mr. Lee's initial brief and reiterated below, the strength of the government's evidence here is outweighed by the other factors that a defendant in Mr. Lee's position would rationally consider in deciding whether to accept a plea that would—with 100% certainty—result in permanent banishment from the only home Mr. Lee has ever known.

II. There are numerous reasons why a defendant would rationally reject a plea to take his chances at trial.

The government's primary contention is that no rational person would go to trial if he is likely to be convicted. U.S. Br. 22–32. That categorical position unfairly discounts the rational reasons why some defendants with deep and longstanding ties to the United States might prefer trial to a plea. It also overstates the certainty of the litigation process.

1. The Sixth Circuit's categorical approach discounts the many reasons a defendant might prefer trial to a plea. As explained in Mr. Lee's opening brief, a rational defendant might actually prefer a longer sentence served in the United States than a shorter sentence followed by mandatory, permanent deportation because of possible changes in legal or prosecutorial discretion or a desire to be close to family. Lee Br. 26–27; accord *DeBartolo* v. *United States*, 790 F.3d 775, 779–80 (7th Cir. 2015); *State* v. *Sandoval*, 249 P.3d 1015, 1022 (Wash. 2011).

The government discounts a desire to remain close to family members as "not reasonable." U.S. Br. 30. But this Court posited that very reason in a question at the *Padilla* oral argument. *Padilla* v. *Kentucky* 10/13/09 Oral Arg. Tr., p. 50 ("[T]he defendant might say: I have been in the United States for 40 years. I have a family. I'd rather take my chances with a jury and get put away for a longer time because at least I'll be in prison where my children can visit me."); contra Ala. *Amicus* Br. 10 (arguing that a longer sentence, served in the U.S., "is the worst of all worlds"). Lee has proven he falls into this category by choosing to spend six additional years in custody to fight his deportation. Lee Br. 4.

Much more significant, the disparity between a defendant's plea sentence and likely sentence following a trial will always be a key factor. Had Mr. Lee been offered a year-and-a-day sentence in a plea offer while facing a possible life sentence, a court might reasonably conclude that it would be irrational to reject the plea despite compelling evidence of a desire to remain in the United States. But in reality, Mr. Lee received almost no tangible benefit from his plea. Contra U.S. Br. 10.

With no adjustments, Mr. Lee's "Guidelines range would have been 33 to 41 months." U.S. Br. 6. With the plea, that range drops to "24 to 30 months." *Ibid.* (The district court exercised its discretion to impose a lesser sentence that was not the result of the plea-bargaining process. J.A. 124–25.) So in exchange for a mere 9 to 11 months, Mr. Lee unknowingly gave up *any* possibility of remaining in the United States. Mr. Lee would have accepted the risk of going to trial if he had known the plea resulted in deportation. Pet. App. 56a. And it is why Mr. Lee's lawyer "would have advised him to" "take[ ] the chance of going to trial" if he had known the plea would result in deportation. Pet. App. 56a; J.A. 244.

Mr. Lee is *not* arguing "that subjective removal concerns should override all objective considerations of litigation strategy." Contra U.S. Br. 28; Ala. *Amicus* Br. 12. Nor is he arguing for a *Padilla*-specific exception to the *Strickland* standard. Contra U.S. Br. 28–29. Lee simply asks that all relevant circumstances be considered. And here, those objective circumstances demonstrate it would have been rational for Mr. Lee to risk adding 9 to 11 months to his sentence in exchange for the possibility he could avoid permanent expulsion from the United States.

Contrary to the government's claim, it is not Mr. Lee but the government who asks for a special, categorical rule: that a defendant who accepts a plea based on ineffective assistance can *never* be prejudiced when faced with purported strong evidence of guilt. Such a *per se* rule is contrary to this Court's admonition that the *Strickland* prejudice analysis does not "establish mechanical rules" but instead "guide[s] the process" for determining whether the result of a "particular proceeding is unreliable" by considering "the totality of the evidence." *Strickland*, 466 U.S. at 695–96. Focusing on a single factor—as the Sixth Circuit did and the government advocates—contradicts that approach. Const. Accountability Ctr. *Amicus* Br. 19–23. Unsurprisingly, "[n]o other circuit has made this mistake." *Id.* at 22–23 (citing decisions from the Second, Third, Fourth, Fifth, Seventh, Ninth, and Eleventh circuits).

2. The Sixth Circuit's categorical approach also overstates the certainty of the litigation process. Evidence that appears strong on an undeveloped record (such as a police report, or an indictment untested by cross-exam) is often not so strong at trial. "[T]there is no such thing as a sure winner," because evidence is tested at trial, and "juries are inherently unpredictable." *Miller UK Ltd.* v. *Caterpillar, Inc.*, 17 F. Supp. 3d 711, 739–40 (N.D. Ill. 2014). Data and results demonstrate time and again that pre-trial perceptions of a trial's likely outcome can be upended by the jury's ultimate decision. See Nat'l Ass'n of Crim. Def. Lawyers *Amicus* Br. 9–15; Cato Inst. *Amicus* Br. 14–21; Lee Br. 25–26.

Consider the circumstances here. The government relies heavily on a confidential informant. U.S. Br. 38 (referencing alleged past CI purchases, the CI's testimony, and the CI's controlled buy). But the government did not disclose the informant's recorded conversations with Lee in its Rule 16 discovery response letter, J.A. 18, 32, 75–82; Presentence Investigation Report (PSR) 4, as Federal Rule of Criminal Procedure 16(a)(1)(B)(i) requires. See *United States* v. *Blueford*, 312 F.3d 962, 965 (9th Cir. 2002); *United States* v. *James*, 495 F.2d 434, 435 (5th Cir. 1974). Information about the informant appeared for the first time in the presentence investigation report. PSR 4. Mr. Lee believed the informant had become problematic and unreliable. J.A. 20 n.2. Regardless, the government's ability to call the informant to testify is at least in question. See Fed. R. Crim. P. 16(d)(2)(C) (if a party fails to comply with Rule 16 disclosure obligations, the court may "prohibit that party from introducing the undisclosed evidence"); *United States* v. *Hardy*, 586 F.3d 1040, 1044 (6th Cir. 2009) ("A proper sanction for failure to disclose under rule 16, is exclusion of the evidence.").

Without the informant, the government's ability to prove intent to distribute becomes considerably more difficult. J.A. 34–35 n.8. And even if the informant was available, Mr. Lee had an entrapment defense based on the informant's chicanery, see J.A. 36–40, a defense which may have been corroborated by an audio recording that the government failed to mention in its Rule 16 letter or otherwise provide to Mr. Lee, J.A. 20. Moreover, if the government had issues with its confidential informant, it might have also had problems with its search warrant, which the government admits was grounded on the informant's testimony. U.S. Br. 38.

Having considered all the evidence actually available to him, Mr. Lee's counsel believed "the best thing that could have come out of [trial] was maybe a possession." J.A. 238. Such a conviction would have been sufficient for Mr. Lee to seek cancellation of removal. 8 U.S.C. § 1229b(a); *In re C-V-T*, 22 I&N Dec. 7 (BIA, 1998). It was no slam dunk that going to trial would have resulted in Mr. Lee's mandatory deportation. Contra U.S. Br. 15.

3. To support its categorical rule, the government invokes the importance of finality and the difficulty in taking a case to trial after the passage of time. U.S. Br. 23–24, 26. To begin, Congress has already addressed the relative weight to be given the finality interest by imposing a one-year limitation period for filing a § 2255 motion. 28 U.S.C. § 2255(f). Here, for example, Mr. Lee contacted his attorney immediately upon learning he was scheduled to be deported. J.A. 137. And despite his attorney's significant delays in providing necessary information, Mr. Lee filed his *pro se* petition less than one year after his sentencing hearing. Pet. App. 57a, 58a–59a.

Seven years have elapsed since the sentencing hearing, but that is no fault of Mr. Lee's. Rather, the delay resulted from the government's decision to flip flop on whether Mr. Lee suffered prejudice. R. 40 Resp. of the U.S. to Pet'r's Post Hr'g Br. in Supp. of Mot. Pursuant to 28 U.S.C. § 2255, pp. 2–3 (explaining the government's previous concession, since withdrawn, that Mr. Lee's counsel was ineffective *and* that Mr. Lee was prejudiced by the deficiency).

In addition, finality and the passage of time are implicated in every case where a defendant seeks post-conviction relief based on ineffective assistance. This Court has consistently upheld the right to

effective assistance over such concerns because "[a]n ineffective assistance claim asserts the absence of one of the crucial assurances that the result of the proceeding is reliable, so finality concerns are somewhat weaker." *Strickland*, 466 U.S. at 694; accord *Padilla*, 559 U.S. at 371 (rejecting similar finality argument).

Given "the frequently drastic consequences of deportation for a long-time resident of this country, it is reasonable for certain defendants to reject a deportation-enabling plea deal." Asian Ams. Advancing Justice & Other Immigrants' Rights Grps. *Amici* Br. 10, 11–18. This does not require the Court to adopt a *per se* rule, but it does require rejection of the Sixth Circuit's categorical rule. Where a defendant claims ineffective assistance in the acceptance of a plea offer with deportation consequences, the courts should consider the totality of the circumstances, including not only the strength of the prosecution's evidence, but also the strength and length of the defendant's ties to the United States, the length of imprisonment, the type of penalty and conditions of confinement, fines, and other consequences.

Here, after serving his year-and-a-day sentence, Mr. Lee has remained in detention for an additional six years, even though he could have allowed himself to be deported and thus obtained his freedom. There should be no doubt that Mr. Lee would have been rationally willing to risk a nominal 9 to 11 months of additional incarceration for the chance of an acquittal or even a conviction of possession only. In fact, most rational individuals in Mr. Lee's circumstances would jump if offered that same tradeoff.

In sum, a district court's assessment of a defendant's likelihood of success at trial is not always the determinative consideration in guilty-plea cases. *Gonzales* v. *United States*, 722 F.3d 118, 132–33 (2d Cir. 2013). This is particularly true with regard to the immigration consequences of a plea. *INS* v. *St. Cyr*, 533 U.S. 289, 321–23 (2001).

This Court should reject a categorical approach to proving *Strickland* prejudice simply because the prosecution possesses strong evidence of guilt at the outset of a case. The Court should reverse the Sixth Circuit's minority position on that issue. And the Court should grant Mr. Lee's § 2255 petition so he may re-engage in plea negotiations while properly advised and, if necessary, invoke his constitutional right to a trial.

III. There are also numerous reasons why a defendant would rationally reject a plea and take his chances at obtaining a different plea, one with lesser immigration consequences.

The government repeatedly says there is "no evidence" Mr. Lee could have persuaded the prosecution to offer a plea that would avoid mandatory, permanent deportation, and that absent such evidence, Mr. Lee is not entitled to relief. U.S. Br. 32–36 (citing *Lafler* v. *Cooper*, 566 U.S. 156 (2012); *Missouri* v. *Frye*, 566 U.S. 134 (2012); and *Premo* v. *Moore*, 562 U.S. 115 (2011)). But the reason there is no evidence is because Mr. Lee's attorney believed he had *already* obtained a plea that would not result in deportation; as a result, he did not even ask for an alternative deal. Pet. App. 55a; J.A. 131.

This is a fact pattern that will appear in virtually every case where a defendant's lawyer misadvises about a plea's deportation consequences. So accepting the government's argument would effectively create a categorical rule that a defendant misadvised about deportation consequences can never show prejudice, even in a context where a defendant could have easily obtained a plea that did not result in mandatory deportation. *Lafler*, *Frye*, and *Premo* did not so hold, and as discussed above, see *supra* § II.1 this Court should continue to eschew categorical prejudice tests. It is true a defendant has no right to a plea. U.S. Br. 35. But it is also true that a defendant has the right to counsel who understands a potential plea's deportation consequences and who bargains effectively to meet the defendant's goals, including the goal of avoiding deportation. *Padilla*, 559 U.S. at 375–76.

A competent lawyer properly informed by the numerous resources available to advise a non-citizen client, see Immigrant Def. Project, et al. *Amici* Br. 21–25, would have attempted to negotiate an alternative plea for Mr. Lee that would have avoided deportation (or at least avoided mandatory removal and permanent exile). And prosecutors have an obligation to consider these alternatives in the interest of justice and judicial efficiency. The Am. Bar Assoc. *Amicus* Br. 19–21; Lee Br. 23. Mr. Lee should not be subjected to a Catch 22 where his lawyer's ineffective assistance deprived him not only of a different plea, but also the evidence to prove that he could have obtained one.

The government makes several additional arguments about pleas; none justifies punishing Mr. Lee for having a bad lawyer.

1. The government calls Mr. Lee's discussion of possible alternative pleas, see Lee Br. 31–33, "sheer speculation" that "falls well short of establishing the requisite 'reasonable probability' of a different outcome." U.S. Br. 42. But actual, documented cases show that these pleas are anything but speculative:

- A legal immigrant from Sudan charged with felony marijuana trafficking rejected a misdemeanor facilitation-of-sale plea that would have resulted in mandatory deportation. After serving eight months, he obtained a dismissal. Immigrant Def. Project, et al. *Amici* Br. 17.
- A lawful permanent resident was caught with 3.2 kilograms of crystal methamphetamine and charged with possession with the intent to distribute a controlled substance. She ultimately pled to making a false statement to a federal officer under 18 U.S.C. § 1001 and was sentenced to probation, a plea that avoided deportability. Immigrant Def. Project, et al. *Amici* Br. 18–19.
- A lawful permanent resident was caught with 89 pounds of marijuana and charged with federal drug offenses under 21 U.S.C. §§ 952 & 960. He negotiated a plea under 18 U.S.C. § 4 for misprision of felony and served four months in jail with two years of supervised release, a plea that avoided aggravated felony status and thus the harshest immigration consequences. Immigrant Def. Project, et al. *Amici* Br. 19–20.

- *Amici* identify many other examples of defendants avoiding mandatory deportation, in a broad variety of contexts. Immigrant Def. Project, et al. *Amici* Br. 11–15. For example, Baindu Marian Mando was a legal permanent resident arrested for attempting to rob a bank. Her attorney consulted an immigration treatise and confirmed that his client would be deported if convicted of robbery and sentenced to one or more years in prison. The federal government was unwilling to negotiate a plea to a misdemeanor, so Mando pled guilty to attempted bank robbery in violation of 18 U.S.C. § 2113(a) and moved for a downward departure. The judge sentenced her to eleven months, time served, thus avoiding aggravated-felony mandatory deportation consequences. *United States* v. *Mando*, No. 3:06-cr-00018-1 (M.D. Tenn.).

These examples are just a sample of what is possible. In many cases, the public will never know how or why a particular plea deal was struck. And in the case of Ms. Mando, it was not the prosecutor but the judge who provided the solution to a thorny deportation problem. This illustrates something judges do often—avoid unintended or overly harsh consequences while still fulfilling the purpose of punishment. (The district court's selection here of a year-and-a-day as Mr. Lee's sentence was likely the result of the court's intent that Mr. Lee be eligible for earlier release for good behavior. See 18 U.S.C. § 3624(b).) Sometimes nominal sentencing changes have substantial immigration consequences. Denying a defendant the opportunity to prove prejudice in such circumstances is jurisprudentially unsound and unjust.

2. The government also says that each plea in Mr. Lee's "extensive list of hypothetical alternative plea deals" is "more favorable to him on *every* dimension than the plea deal he was actually offered." U.S. Br. 44. That is not accurate. A conviction for misprision of a felony under 18 U.S.C. § 4 can result in imprisonment of up to three years, two years longer than Mr. Lee's actual sentence, yet does not have mandatory deportation consequences. A plea to making a false statement under 18 U.S.C. § 1001 (noted above) can result in imprisonment of up to five years. Mr. Lee also could have pled guilty to multiple simple-possession misdemeanor offenses—or a misdemeanor offense plus a guilty plea to being an accessory after the fact under 18 U.S.C. § 3—with consecutive prison sentences running longer *in toto* than the sentence he actually received but without the mandatory deportation consequences. There are numerous options. And that Mr. Lee has been willing to spend seven years in detention leaves no doubt he would have been willing to accept even a much longer sentence in exchange for remaining in the country where he has lived since childhood.

3. The government also suggests that the district court considered Mr. Lee's offense to be serious, and that any leniency would be unlikely. U.S. Br. 6–7, 45–46. But after weighing all the sentencing factors listed in 18 U.S.C. § 3553(a)(2)—including Mr. Lee's gainful employment in an "entrepreneurial capacity," his lack of a criminal record, his lack of a violent history, and his lack of danger to the community—the sentencing judge concluded that a below-Guidelines sentence was appropriate. J.A. 125. It cannot be said that Mr. Lee had no possibility of obtaining a plea that would have satisfied his goal of avoiding deportation.

4. Finally, the government says that Mr. Lee's proposed alternative pleas are dispositions "that *any* defendant, not just an alien, would have preferred." U.S. Br. 44. Again, that is not accurate. A citizen defendant with no deportation concerns would never accept a plea that results in a longer sentence, yet that is an outcome Mr. Lee would happily accept if it meant reduced deportation consequences. In fact, Mr. Lee is in a very different position than millions of other non-citizens. As a legal permanent resident with over seven years of residence in the country, he may seek cancellation of removal under 8 U.S.C. § 1229b(a) so long as he is not convicted for an "aggravated felony" drug offense. Accordingly, Mr. Lee would accept virtually *any* plea offense that did not trigger aggravated-felony mandatory deportation consequences. Yet a plea that resulted in mandatory deportation is the only plea Mr. Lee's own attorney recommended.

Given all the relevant circumstances, it is objectively rational for Mr. Lee to reject a plea that guaranteed the only consequence he sought to avoid. The court of appeals should be reversed and Mr. Lee's § 2255 petition granted.

CONCLUSION

For the foregoing reasons and those stated in Petitioner's opening brief, the judgment of the court of appeals should be reversed.

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Respondent.

On Writ of Certiorari to the
United States Court of Appeals for the Sixth Circuit

BRIEF FOR ALABAMA, ARIZONA, ARKANSAS, FLORIDA, GEORGIA, IDAHO, INDIANA, KANSAS, LOUISIANA, MICHIGAN, MISSOURI, MONTANA, OHIO, OKLAHOMA, SOUTH DAKOTA, TEXAS, TENNESSEE, WEST VIRGINIA, WISCONSIN, AND WYOMING AS AMICI CURIAE SUPPORTING RESPONDENT

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QUESTION PRESENTED

Can a defendant who was misadvised as to his plea's deportation consequences demonstrate prejudice under *Strickland* v. *Washington*, 466 U.S. 668 (1984), and *Padilla* v. *Kentucky*, 559 U.S. 356 (2010), where there is no evidence that his counsel's misadvice caused him to forgo a reasonable probability of obtaining a more favorable outcome to his criminal proceedings that would have avoided deportation?

TABLE OF CONTENTS

Question Presented i

Table of Authorities iii

Interest of Amici Curiae 1

Summary of the Argument 1

Argument 4

I. To establish prejudice arising from counsel's misadvice regarding deportation consequences, a defendant must show a reasonable probability that he would have secured a more favorable outcome for himself, but for counsel's misadvice. 5

II. A rational defendant would not reject a plea in favor of proceeding to trial where there was overwhelming evidence of guilt and he had no *bona fide* defense. 10

III. There is not a reasonable probability that a defendant could have obtained a plea with lesser deportation consequences absent specific evidence to that effect in the record. 14

Conclusion 22

TABLE OF AUTHORITIES

Cases

Crawford-El v. *Britton*,
523 U.S. 574 (1998) 12

Esquival-Quintana v. *Sessions*,
No. 16-54 (argued Feb. 27, 2017) 19

Gonzalez v. *Duenas-Alvarez*,
549 U.S. 183 (2007) 20

Hill v. *Lockhart*,
474 U.S. 52 (1985) ..... passim

Kovacs v. *United States*,
744 F.3d 44 (2d Cir. 2014) 11

Lafler v. *Cooper*,
566 U.S. 156 (2012) 14

Mellouli v. *Lynch*,
135 S. Ct. 1980 (2015) 19

Missouri v. *Frye*,
566 U.S. 133 (2012) 1, 17

Moncrieffe v. *Holder*,
133 S. Ct. 1678 (2013) 20

Padilla v. *Kentucky*,
559 U.S. 356 (2010) ..... passim

Premo v. *Moore*,
562 U.S. 115 (2011) 13

Price Waterhouse v. *Hopkins*,
490 U.S. 228 (1989) 17

Roe v. *Flores-Ortega*,
528 U.S. 470 (2000) 9, 21

Strickland v. *Washington*,
466 U.S. 668 (1984) ..... passim

Torres v. *Lynch*,
136 S. Ct. 1619 (2016) 20

United States v. *Smith*,
440 F.2d 521 (7th Cir. 1971) 7

United States v. *Timmreck*,
441 U.S. 780 (1979) 7

Statutes

CAL. PENAL CODE § 1016.3(b) 18

Immigration and Nationality Act,
8 U.S.C. § 1101 *et seq* 19

Other Authorities

Heidi Altman, *Prosecuting Post-Padilla: State Interests and the Pursuit of Justice for Noncitizen Defendants*, 101 GEO. L. J. 1 (2012) 18, 19

U.S. Dep't of Justice, *United States Attorneys Manual, Pretrial Diversion Program*,
§ 9-22.010 16

Wex S. Malone, *Ruminations on Cause-In-Fact*, 9 STAN. L. REV. 60 (1956) 17

INTEREST OF AMICI CURIAE

As this Court has acknowledged, the reality in today's world is "that plea bargains have become . . . central to the administration of the criminal justice system." *Missouri* v. *Frye*, 566 U.S. 133, 143 (2012). Pleas account for more than ninety percent of all state and federal convictions, *id.*, and the *amici* states thus have a compelling interest in ensuring the validity, reliability, and fairness of every plea agreement negotiated by state prosecutors, and in protecting the finality of every resulting conviction.

At issue in this case is how prejudice should be assessed when defense counsel misadvises her client on the deportation consequences of a plea. Petitioner Jae Lee proposes what amounts to a virtual *per se* rule of prejudice that would dramatically depart from the established approach for determining when ineffective assistance of counsel is prejudicial to the defense. If adopted, it would impose tremendous burdens on state resources, both prosecutorial and judicial, years after the original plea was entered, and would impair the states' interest in the orderly and efficient operation of state criminal justice systems.

SUMMARY OF THE ARGUMENT

A defendant who pleads guilty after receiving misadvice regarding the deportation consequences of conviction can obtain relief only if he shows he was prejudiced by the misadvice. Where the evidence of guilt was overwhelming and the defendant had no *bona fide* defenses, he cannot make that showing.

1. In *Padilla* v. *Kentucky*, 559 U.S. 356 (2010), this Court held that the Sixth Amendment guarantees criminal defendants the right to competent advice about the deportation consequences associated with their conviction. But *Padilla* did not resolve when such an error would be prejudicial to the defense, thus entitling the defendant to new trial. Well-established law provides the framework for that prejudice inquiry.

Deficient advice that precedes a plea agreement is prejudicial only where the defendant can "show that there is a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial." *Hill* v. *Lockhart*, 474 U.S. 52, 59 (1985). In making that determination, courts objectively assess the likely outcome of the trial that would have taken place had the defendant not accepted the plea. *Id.* at 59-60; *Strickland* v. *Washington*, 466 U.S. 668, 695 (1984) (prejudice inquiry must be objective). A defendant who would have had little chance of "succeed[ing] at trial" will therefore not be able to show prejudice. *Hill*, 474 U.S. at 59.

Padilla did not alter that test. To the contrary, it embraced the *Strickland* standard, stating that "lower courts—now quite experienced with applying *Strickland*—can effectively and efficiently use its framework to separate specious claims from those with substantial merit." 559 U.S. at 372. Showing prejudice remains a "high bar" for defendants who pleaded guilty following misadvice regarding deportation. *Id.* at 371.

2. Lee nonetheless asks this Court to adopt an entirely new regime when counsel's deficient performance involved misadvice about the deportation consequences of a conviction. In his view, such a defendant is entitled to withdraw his plea whenever he can show that deportation consequences were very important to him. That is because, Lee first maintains, such a defendant would have rolled the dice and gone to trial even where the evidence of his guilt was overwhelming and he had no *bona fide* defenses.

But a rational defendant in such a case would not forgo the plea and proceed to trial because the reasonably probable outcome at trial would be a conviction for the charged offense—which would not avoid mandatory deportation and would result in a longer prison sentence. Allowing defendants to obtain relief in that situation effectively eliminates the objective inquiry. If it is rational to go to trial in the face of overwhelming evidence and no defenses, it is rational in every case. To establish prejudice, a defendant would only need to convince the court that, subjectively, he would have been willing to go to trial. That would be a stark departure from the rule adopted in *Strickland* and *Hill*.

3. Lee alternatively asserts that he was prejudiced because the prosecution might have offered him a better plea deal, with lesser deportation consequences. But this Court has never held that a defendant can show prejudice based on pleas he *might* have negotiated absent his counsel's misadvice, for obvious reasons. Unless a better offer was actually on the table at some point during the

negotiations, any suggestion that the defendant might have negotiated a better plea is sheer speculation. And it is sheer speculation that every defendant can assert in every case, collapsing the test *for* prejudice into a *per se* rule *of* prejudice.

Making matters worse, that speculation incorrectly assumes that prosecutors are exercising their discretion by taking immigration consequences into account during plea negotiations. To the contrary, many prosecutors do not. They question whether it is fair to enter plea agreements with noncitizen defendants that they would not offer to citizens charged with the exact same crime. And, because *Padilla* imposes additional burdens only on defense counsel, they are under no obligation to develop expert knowledge of the complicated field of immigration law. This Court should reject Lee's novel, unwieldy theory of prejudice.

ARGUMENT

In *Strickland* v. *Washington*, 466 U.S. 668 (1984), and *Hill* v. *Lockhart*, 474 U.S. 52 (1985), this Court adopted an objective test for prejudice under which courts assess the likely outcome of the trial that would have taken place had the defendant not accepted the plea. Lee cannot prevail under that test. He therefore proposes an alternative approach to prejudice for cases involving deportation consequences. That approach is deeply flawed.

Lee's proposal eliminates the objective component of the prejudice inquiry, entitles a defendant to a new trial even when he cannot show that a trial would have produced a better result than the plea,

and improperly presumes that all prosecutors would exercise their discretion by offering noncitizens better plea deals than they would offer similarly situated citizens. Operationally, it would quickly devolve into a virtual *per se* rule of prejudice that cannot be reconciled with this Court's precedents and would not further the ends of justice.

I. To establish prejudice arising from counsel's misadvice regarding deportation consequences, a defendant must show a reasonable probability that he would have secured a more favorable outcome for himself, but for counsel's misadvice.

1. When this Court adopted the modern test for assessing ineffective-assistance-of-counsel claims, it recognized the competing interests at play. On one hand, "[a]n accused is entitled to be assisted by an attorney, whether retained or appointed, who plays the role necessary to ensure that the trial is fair." *Strickland*, 466 U.S. at 685. On the other hand, "[a]n error by counsel, even if professionally unreasonable, does not warrant setting aside the judgment of a criminal proceeding if the error had no effect on the judgment." *Id.* at 691. Because "[a]ttorney errors come in an infinite variety, and are as likely to be utterly harmless in a particular case as they are to be prejudicial," our criminal justice system could not survive if every deficient act by counsel entitled the defendant to a new trial. *Id.* at 693. For that reason, a "defendant must show that there is a reasonable probability that, but for counsel's unprofessional

errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* at 694.

The prejudice inquiry is an objective one: An "assessment of the likelihood of a result more favorable to the defendant must exclude the possibility of arbitrariness, whimsy, caprice, 'nullification,' and the like." *Id.* at 695. A court may not consider irrational outcomes, for "[a] defendant has no entitlement to the luck of a lawless decisionmaker." *Id.* Instead, a reviewing court "should proceed on the assumption that the decision maker is reasonably, conscientiously, and impartially applying the standards that govern the decision." *Id.* What matters are objective considerations, such as "the totality of the evidence before the judge or jury," whether "factual findings [were] unaffected by the errors," whether "a verdict or conclusion [was] weakly supported by the record," and so on. *Id.* at 695-96.

2. The "justifications for imposing the 'prejudice' requirement in *Strickland* v. *Washington* are also relevant in the context of guilty pleas." *Hill*, 474 U.S. at 57. Indeed, the prejudice requirement is especially important when "defendants challenge the validity of their guilty pleas" because such challenges undermine "the fundamental interest in the finality of guilty pleas." *Id.* at 58. As this Court explained,

> Every inroad on the concept of finality undermines confidence in the integrity of our procedures; and, by increasing the volume of

> judicial work, inevitably delays and impairs the orderly administration of justice. The impact is greatest when new grounds for setting aside guilty pleas are approved, because the vast majority of criminal convictions result from such pleas. Moreover, the concern that unfair procedures may have resulted in the conviction of an innocent defendant is only rarely raised by a petition to set aside a guilty plea.

Id. at 58 (quoting *United States* v. *Timmreck*, 441 U.S. 780, 784 (1979) (quoting *United States* v. *Smith*, 440 F.2d 521, 528-29 (7th Cir. 1971) (Stevens, J., dissenting)).

Of course, the prejudice inquiry in guilty plea cases necessarily differs from cases in which a trial was held. To demonstrate prejudice in the plea context, "the defendant must show that there is a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial." *Id.* at 59. As this Court explained, that inquiry often "will closely resemble the inquiry engaged in by courts reviewing ineffective-assistance challenges to convictions obtained through a trial." *Id.* Where, for example, counsel's error was in failing to discover exculpatory evidence or failing to advise the defendant about a potential affirmative defense, "whether the error 'prejudiced' the defendant by causing him to plead guilty rather than go to trial will depend . . . in large part on a prediction whether" the evidence or affirmative defense would have produced a not-guilty verdict. *Id.* at 59. And the test remains objective: "[P]redictions of the outcome at a possible trial,

where necessary, should be made objectively, without regard for the 'idiosyncrasies of the particular decisionmaker.'" *Id.* at 60-61 (quoting *Strickland*, 466 U.S. at 695).

The misadvice in *Hill* concerned parole eligibility. Hill alleged that counsel told him he would be eligible for parole after serving one-third of his sentence when in fact—because he had a prior felony conviction—he had to serve half of his sentence before becoming eligible for parole. *Id.* at 54-55. The Court held that Hill was not prejudiced for two reasons. First, he failed to allege that "had counsel correctly informed him about his parole eligibility date, he would have pleaded not guilty and insisted on going to trial." *Id.* at 60. Second, there was no objective basis to believe he would have gone to trial, for his mistaken belief "would seem to have affected not only his calculation of the time he likely would serve if sentenced pursuant to the proposed plea agreement, but also his calculation of the time he likely would serve if he went to trial and were convicted." *Id.* at 60.

A defendant who wishes to withdraw a guilty plea based on misadvice that did not relate to the likelihood of conviction must therefore make two independent showings. He must first demonstrate that, subjectively, the misadvice mattered to him—that he sufficiently conveyed to counsel his desire to avoid deportation, and that he would not have accepted the plea had he received correct advice as to its deportation consequences. Second, he must demonstrate, objectively, "that a decision to reject the plea bargain would have been rational under the

circumstances." *Roe* v. *Flores-Ortega*, 528 U.S. 470, 486 (2000). The latter inquiry principally asks what the "likely" result would have been "if he went to trial and were convicted." *Hill*, 474 U.S. at 60.

Critically, a defendant cannot show prejudice solely by showing how much he "cared" about a particular consequence. *But see* Pet. Br. 19, 27. As the Court stated in *Flores-Ortega* (in the context of counsel who failed to file an appeal), "[t]o prove deficient performance, a defendant can rely on evidence that he sufficiently demonstrated to counsel his interest in an appeal. But such evidence alone is insufficient to establish that, had the defendant received reasonable advice from counsel, . . . he would have instructed his counsel to file an appeal." 528 U.S. at 486.

3. The Court's decision in *Padilla* v. *Kentucky* did not change the basic showing required to establish prejudice. To the contrary, *Padilla* dismissed "floodgates" concerns raised by the United States and state amici because it saw "no reason to doubt that lower courts—now quite experienced with applying *Strickland*—can effectively and efficiently use its framework to separate specious claims from those with substantial merit." 559 U.S. at 372.

Padilla also reiterated the objective requirement that the defendant show that his decision to forego his plea deal was "'rational under the circumstances.'" *Id.* (quoting *Flores-Ortega*, 528 U.S. at 486). All told, the Court observed, "it is often quite difficult for petitioners who have acknowledged their guilt to satisfy *Strickland*'s prejudice prong." *Id.* at 371 n.12. The standard for showing prejudice

therefore remained a "high bar" for Padilla to surmount on remand, even after prevailing on the deficient performance prong of the test. *Id.* at 371. That would not have been the case if he merely had to show, subjectively, that deportation consequences mattered a great deal to him.

II. A rational defendant would not reject a plea in favor of proceeding to trial where there was overwhelming evidence of guilt and he had no *bona fide* defense.

Because *Padilla* did not alter the objective nature of the prejudice test, a defendant seeking to overturn his plea agreement based on a *Padilla* claim must demonstrate that it would have been "rational under the circumstances" for him to have declined the plea in favor of going to trial. It is *not* objectively rational for a defendant to forego a plea offer that would significantly reduce his sentence where the evidence against him is overwhelming and he has no *bona fide* defenses.

1. A rational defendant considers the likelihood, based on the evidence then known, of the jury returning a guilty verdict on the charged offenses. That result is the worst of all worlds—the defendant gets a longer prison sentence than he would have received under the plea offer, and he is still subject to mandatory removal. *See Hill*, 474 U.S. at 60 (finding no objective prejudice where the likely conviction would have produced the same negative consequence as the plea the defendant accepted based on deficient advice).

A rational defendant might be willing to take his chances at trial where the evidence is circumstantial, there are holes in the government's case, some of the prosecution witnesses have contradicted themselves, strong arguments exist for the suppression of important evidence, or he has viable affirmative defenses. For instance, in *Kovacs* v. *United States*, 744 F.3d 44, 48 (2d Cir. 2014), the Second Circuit found prejudice based on misadvice about deportation consequences where the defendant sacrificed a colorable statute of limitations defense by accepting a plea agreement. The court found that the defendant could have rationally taken the case to trial because there was a reasonable probability his statute of limitations defense would have succeeded, allowing him to "avoid immigration consequences." *Id.* at 53.

Where no such favorable circumstances exist, and the evidence is overwhelmingly stacked against the defendant, it cannot be said—objectively—that a rational defendant would choose to go to trial. That calculus is not changed when the misadvice concerns deportation. As Judge Batchelder recognized, "deportation would have flowed just as readily from a jury conviction as from a guilty plea." Pet. App. 3a.

2. In arguing to the contrary, Lee effectively seeks to eliminate all objective considerations from the prejudice inquiry. According to Lee, a rational defendant might want to roll the dice at trial even though the odds seem hopeless (Pet. Br. 25-26); might actually prefer the longer prison term that would flow from conviction after trial (*id.* at 26-27); or might bank on "the disarray in the enforcement of

U.S. immigration law" (*id.* at 27 (internal quotation marks omitted)). But a defendant can assert those reasons for wanting to go to trial—which are "easy to allege and hard to disprove," *Crawford-El* v. *Britton*, 523 U.S. 574, 585 (1998)—in *every* case. If courts do not take into account the likelihood of success at trial, defendants will be entitled to "do-overs" in every case where the court finds credible the defendant's subjective and self-serving claim that he would have been willing to go to trial notwithstanding immensely long odds.

By removing all objective considerations from the prejudice inquiry, Lee's approach conflicts with *Padilla*'s express retention of the prejudice standard from *Strickland* and *Hill*. As explained in § I, *supra*, *Strickland* and *Hill* clearly state that prejudice must be *objectively* shown. Their tests ask what a "rational" person would have done, not what the particular defendant subjectively would have done. For that very reason, the prejudice inquiry "exclude[s] the possibility of arbitrariness, whimsy, caprice, 'nullification,' and the like." *Strickland*, 466 U.S. at 695. Yet Lee's version of prejudice depends on the possibility of arbitrariness and nullification. Instead of "assum[ing] that the decision maker is reasonably, conscientiously, and impartially applying the standards that govern the decision," *id.*, his theory banks on a decisionmaker who opts to ignore the overwhelming evidence and instead acts irrationally. Unless this Court is to adopt an entirely new prejudice regime for deportation consequences, that approach must be rejected.

Lee also posits that he might have caught some breaks had he declined the plea offer. Pet. Br. 25. Maybe a witness would have failed to show up at trial or evidence would have been suppressed. This argument, too, eliminates the objective inquiry. Every defendant in every case can claim that luck would have been on his side had he only declined to plead guilty. And the government can never disprove such a claim. For good reason, then, this Court has held that "[t]he added uncertainty that results when there is no extended, formal record and no actual history to show how the charges have played out at trial works against the party alleging inadequate assistance." *Premo* v. *Moore*, 562 U.S. 115, 132 (2011). Whether it would have been rational for a defendant to go to trial can only be assessed by the state of the case at the time of the plea. Where "the evidence of guilt was 'overwhelming'" and the defendant "has no *bona fide* defense," Pet. App. 3a, 10a, it would not have been rational to take the case to trial.

3. One reason *Hill* adopted a demanding prejudice requirement was because "the concern that unfair procedures may have resulted in the conviction of an innocent defendant is only rarely raised by a petition to set aside a guilty plea." 474 U.S. at 58 (internal quotation marks omitted). This case vividly illustrates that fact. There is no genuine dispute that Lee committed the crime to which he pleaded guilty. It should therefore come as no surprise that the objective inquiry adopted in *Hill* provides no relief to Lee. By contrast, an actually innocent noncitizen defendant who pleaded guilty

based on misadvice regarding deportation will almost certainly be able to show that it would have been rational for him to have gone to trial.

Lee's approach also clashes with *Lafler* v. *Cooper*, 566 U.S. 156 (2012). *Cooper* held that a defendant who declined a plea offer due to his attorney's misadvice can maintain an ineffective-assistance claim when the "conviction or sentence, or both, under the offer's terms would have been less severe than under the judgment and sentence that were in fact imposed" after trial. *Id.* at 164. That is precisely the prejudice showing that Lee wishes to avoid. He insists that he can show prejudice *without* showing that the option he passed up would have produced a better result. This Court should not adopt that anomalous rule.

III. There is not a reasonable probability that a defendant could have obtained a plea with lesser deportation consequences absent specific evidence to that effect in the record.

This Court has never suggested that a defendant who entered a plea agreement based on the ineffective assistance of counsel could show prejudice simply by claiming he might have obtained a better plea, and for good reason. Except where the better offer was actually on the table, any suggestion that the defendant might have negotiated a better plea is sheer speculation—speculation that every defendant in every case can make. Lee's approach effectively amounts to *per se* prejudice whenever a defendant shows misadvice based on deportation consequences.

1. As discussed in § I, *infra*, the Court in *Hill* held that a defendant must make two showings to establish prejudice in the plea context. First, he must allege that he would have gone to trial had counsel provided him the correct advice. 474 U.S. at 59. Second, he must show a reasonable probability that going to trial would have produced a better outcome for him. *Id.* (the inquiry often "will closely resemble the inquiry engaged in by courts reviewing ineffective-assistance challenges to convictions obtained through trial"); *id.* at 60 (Hill's mistaken belief about parole eligibility "would seem to have affected not only his calculation of the time he likely would serve if sentenced pursuant to the proposed plea agreement, but also his calculation of the time he likely would serve if he went to trial and were convicted"). *Hill* did not even hint that a defendant could show prejudice by claiming that the government might have offered him a better plea deal had he rejected the initial offer. The Court had ample reason not to go down that road.

The Sixth Circuit was surely correct when it described "the possibility that the prosecutor might have agreed" to a plea agreement with lesser deportation consequences as "sheer speculation." Pet. App. 7a-8a. Absent an actual offer that was on the table, how can we ever know whether the prosecution might have lowered its asking price for an admission of guilt? It is easy enough to posit, as Lee does (Pet. Br. 20-23), better deals with lesser deportation consequences. But a court will never know, with any acceptable measure of confidence,

whether the prosecution would in fact have acceded to such an agreement.

Even where the prosecution's case is relatively weak and the evidence perhaps only justifies conviction for a lesser offense with lesser deportation consequences, we cannot know whether the prosecution would have offered a plea to that lesser offense. What counts as a relatively weak case is in the eye of the beholder, and there are as many different views regarding when to reduce charges as there are prosecutors.

The present case, of course, is just the opposite. "A government witness was prepared to testify that he had purchased ecstasy from Lee on a number of occasions, dozens of pills were discovered during a lawful search of Lee's home, and Lee himself admitted not only that he had possessed ecstasy, but also that he had distributed the drug to his friends." Pet. App. 2a. The notion that the prosecution would have offered Lee pretrial diversion after going to the trouble to indict him (*see* U.S. Dep't of Justice, *United States Attorneys Manual*, *Pretrial Diversion Program*, § 9-22.010 ("in the majority of cases, offenders are diverted at the pre-charge stage")) or reduced the charge to failure to pay taxes, keep records, or some violation of the Food, Drug, and Cosmetics Act strains credulity. *But see* Pet. Br. 20-22. Nor is there any basis to believe the prosecution would have agreed to charge Lee merely with simple possession, given that Lee's own attorney believed conviction for simple possession to be a long shot at trial. J.A. 218-19, 238.

We cannot, of course, be certain that the prosecutors would not have made such an offer. But that is precisely the point. Unless a specific offer of a reduced charge was on the table, it is simply unknowable. And as Justice O'Connor wrote in a different context, "[i]t challenges the imagination of the trier to probe into a purely fanciful and unknowable state of affairs." *Price Waterhouse* v. *Hopkins*, 490 U.S. 228, 264 (1989) (O'Connor, J., concurring) (quoting Wex S. Malone, *Ruminations on Cause-In-Fact*, 9 STAN. L. REV. 60, 67 (1956)).

To be sure, this Court in *Missouri* v. *Frye*, 566 U.S. 133 (2012), tolerated a measure of speculation regarding plea offers—but of a different type than what Lee invites this Court to embrace. There, the Court held that defendants can maintain a Sixth Amendment claim based on "ineffective assistance of counsel where a plea offer has lapsed or been rejected because of counsel's deficient performance." *Id.* at 147. To show prejudice, a defendant must (among other things) "demonstrate a reasonable probability the plea would have been entered without the prosecution canceling it or the trial court refusing to accept it, if they had the authority to exercise that discretion under state law." *Id.* As the Court explained, however, "in most instances it should not be difficult to make an objective assessment as to whether or not a particular fact or intervening circumstance would suffice, in the normal course, to cause prosecutorial withdrawal or judicial nonapproval of a plea bargain." *Id.* at 149. By contrast, there is no measurable way to gauge whether a prosecutor would have offered an

altogether different plea agreement that never previously existed.

2. Finding prejudice based on speculation about imagined plea offers suffers from an additional infirmity: It wrongly assumes that prosecutors around the nation are uniformly exercising their discretion by taking immigration consequences into account during plea negotiations. Yet while certain states and localities have imposed affirmative duties on prosecutors to consider immigration consequences during plea negotiations with noncitizens, *see, e.g.*, CAL. PENAL CODE § 1016.3(b), many have not. *See* Heidi Altman, *Prosecuting Post-Padilla: State Interests and the Pursuit of Justice for Noncitizen Defendants*, 101 GEO. L. J. 1, 26 (2012).

Lee's test creates an entitlement to a favorable exercise of prosecutorial discretion, but no legal principle prescribes that such discretion be exercised in any particular way in this context. And prosecutors have weighty reasons for choosing *not* to take deportation consequences into account during plea negotiations.

First, doing so means prosecutors would be reducing charges against noncitizens in circumstances where they would not reduce charges against citizens charged with the exact same crime. Many prosecutors are understandably reluctant to follow that course, believing it amounts to preferential treatment, undermining notions of fairness and equity. *See* Altman, *supra*, at 2, 30-31. A survey about the role immigration consequences should play in plea negotiations showed that nearly half of those prosecutors who generally favored

consideration of immigration consequences as part of the process nonetheless "rarely" or "never" altered plea offers in light of immigration consequences. *See id.* at 29.

Indeed, it is difficult to imagine a prosecutor offering a citizen any of the proposed alternatives Lee suggests, which (as the United States notes) are "more favorable to him on every dimension than the plea deal he was actually offered" and therefore amount to "unilateral concessions by the government." U.S. Br. 44. And it is far from clear that a court would accept a hypothetical "creative" deal under which the defendant would plead guilty to a lesser offense with lesser deportation consequences, but would agree to an unusually high sentence for that lesser offense.

Second, that approach imposes upon prosecutors the burden of becoming experts in one of the most complicated areas of the law. As illustrated by the plethora of cases before this Court concerning whether a particular offense results in deportation under the Immigration and Nationality Act ("INA"), 8 U.S.C. § 1101 *et seq.*, it is exceedingly difficult for a non-expert to determine the immigration consequences of state convictions. *See, e.g.*, *Esquival-Quintana* v. *Sessions*, No. 16-54 (argued Feb. 27, 2017) (addressing whether California conviction for "unlawful sexual intercourse with a minor who is more than three years younger than the perpetrator" is grounds for mandatory removal); *Mellouli* v. *Lynch*, 135 S. Ct. 1980 (2015) (holding that conviction for Kansas state law crime of possession of drug paraphernalia not a deportable offense);

Gonzalez v. *Duenas-Alvarez*, 549 U.S. 183 (2007) (holding that California state law crime of taking vehicle without consent is removable offense); *Torres* v. *Lynch*, 136 S. Ct. 1619 (2016) (holding that New York state law offense constituted aggravated felony under INA even though it did not include interstate commerce element); *Moncrieffe* v. *Holder*, 133 S. Ct. 1678 (2013) (holding that alien's conviction under Georgia state law for possession with intent to distribute marijuana did not constitute aggravated felony under INA).

Padilla imposed the burden of learning immigration consequences on *defense* counsel, not the prosecution. 559 U.S. at 367 ("counsel must advise her client regarding the risk of deportation"). That was appropriate, for the Sixth Amendment concerns the relationship between the defendant and his counsel, not between either of them and the prosecution. Lee's "maybe the prosecutor would have offered a better deal" approach turns that division of responsibilities on its head, implicitly assuming that prosecutors have the duty to take defendants' immigration consequences into account. They do not.

3. Finally, Lee's proposed approach also fails because it amounts to a *per se* rule of prejudice. *Every* defendant can claim that his counsel *might* have been able to extract a better offer and that he would, of course, have gladly accepted that offer. Such a *per se* rule cannot, however, be reconciled with *Padilla*'s recognition that "it is often quite difficult for petitioners who have acknowledged their guilt to satisfy *Strickland*'s prejudice prong," 559

U.S. at 371 n.12, and its recognition that the standard for showing prejudice is a "high bar" for defendants to surmount. *Id.* at 371. This Court has presumed prejudice from deficient performance only where the defendant "was—either actually or constructively—denied the assistance of counsel altogether." *Flores-Ortega*, 528 U.S. at 483. Counsel who provides misadvice as to deportation consequences does not fit within that category.

* * *

Crediting Lee's subjective desire to avoid deportation as sufficient to demonstrate prejudice under *Strickland* and *Hill* would be a radical departure from existing Sixth Amendment jurisprudence, and would result in a presumption of prejudice anytime a defendant successfully showed that his counsel had misadvised him as to a plea's deportation consequences. This would burst open the floodgates that *Padilla* purported to keep in check with the lower courts' "experienced" application of *Strickland*'s objective test. It would also leave state and federal prosecutors with the burden of relitigating cases or renegotiating pleas years after the fact in cases where the ultimate outcome would not have changed had defense counsel *not* provided erroneous advice as to the negotiated plea's deportation consequences in the first place. This Court should reject Lee's proposed reworking of the prejudice inquiry, maintain its objective component, and hold that Lee failed to show a reasonable probability that he would have secured a more favorable outcome but for counsel's misadvice.

CONCLUSION

The judgment of the Sixth Circuit should be affirmed.

Respectfully submitted,

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REVIEW AND BRIEFS

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In the Supreme Court of the United States

JAE LEE,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF OF THE AMERICAN BAR ASSOCIATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

In the context of a noncitizen defendant with longtime legal resident status and extended familial and business ties to the United States, whether it is always irrational for a defendant to reject a plea offer notwithstanding strong evidence of guilt when the plea would result in mandatory and permanent deportation.

TABLE OF CONTENTS

QUESTION PRESENTED i

TABLE OF AUTHORITIES iii

INTEREST OF THE AMICUS CURIAE 1

SUMMARY OF ARGUMENT 5

ARGUMENT 6

A. THE ABA CRIMINAL JUSTICE STANDARDS WERE REVISED TO INCORPORATE THE REQUIREMENTS OF *PADILLA* TO PREVENT PREJUDICE TO DEFENDANTS 6

B. THE ABA STANDARDS RECOGNIZE THAT IT IS RATIONAL FOR A DEFENDANT TO CHOOSE TRIAL OVER MANDATORY AND PERMANENT DEPORTATION. 10

C. INCOMPETENT ADVICE ABOUT THE IMMIGRATION CONSEQUENCES OF A PLEA MAY DEPRIVE A DEFENDANT OF THE ABILITY TO PROPOSE ALTERNATIVE SENTENCES THAT AVOID DEPORTATION. 14

D. INEFFECTIVE ASSISTANCE OF COUNSEL HARMS NOT ONLY THE DEFENDANT, BUT THE CRIMINAL JUSTICE SYSTEM AS WELL. 19

CONCLUSION 21

TABLE OF AUTHORITIES

CASES

Commonwealth v. DeJesus,
9 N.E.3d 789 (Mass. 2014) 13

Delgadillo v. Carmichael,
332 U.S. 388 (1947) 11

Hill v. Lockhart,
474 U.S. 52 (1985) 6, 14

INS v. St. Cyr,
533 U.S. 289 (2001) 7, 11, 20

Ng Fung Ho v. White,
259 U.S. 276 (1922) 7

North Carolina v. Alford,
400 U.S. 25 (1970) 6

Ortega-Araiza v. State,
331 P.3d 1189 (Wyo. 2014) 13

Padilla v. Commonwealth,
381 S.W.3d 322 (Ky. Ct. App. 2012) 12, 17

Padilla v. Kentucky,
559 U.S. 356 (2010) . . . . . *passim*

People v. Martinez,
304 P.3d 529 (Cal. 2013), *as modified on denial of reh'g* (Sept. 11, 2013) 12

Roe v. Flores-Ortega,
528 U.S. 470 (2000) 10

Strickland v. Washington,
466 U.S. 668 (1984) 3, 5, 10, 13

United States v. Kwan,
407 F.3d 1005 (9th Cir. 2005) 15, 17

CONSTITUTION

U.S. Const. amend. VI 4, 6, 21

STATUTES

21 U.S.C. § 841(a)(1) 17

RULES

Sup. Ct. R. 37.6 1

OTHER AUTHORITIES

ABA Mission and Goals 1

ABA Report with Recommendation 103E (Criminal Justice Section) (2007) 15

ABA Report with Recommendation 100C (Criminal Justice Section) (2010) ..... *passim*

ABA Report with Resolution 115B (Immigration Law) (2002) 2

ABA Report with Resolution 104E (Criminal Justice Section) (2013) 10

ABA Standards for Criminal Justice, Pleas of Guilty (2d ed. 1982)
14-3.2 7

ABA Standards for Criminal Justice, Pleas of Guilty (3d ed. 1999)
14-1.4 ..... 11, 18
14.3.1 16
14-3.2 7

ABA Standards for Criminal Justice, Prosecution Function and Defense Function (3d ed. 1993)
4-5.1 7

ABA Standards for Criminal Justice: Prosecution Function and Defense Function (4th ed. 2015)
3-1.2 15
3-4.1 16
3-8.1 20
4-5.5 ..... 4, 8, 9, 10
4-6.1 ..... 10, 11

Warren E. Burger, *Introduction: The ABA Standards for Criminal Justice*, 12 Am. Crim. L. Rev. 251 (1974) 3

Rory K. Little, *ABA's Project to Revise the Criminal Justice Standards for the Prosecution and Defense Functions*, 62 Hastings L.J. 1111 (2011) 3, 4

Martin Marcus, *The Making of the ABA Criminal Justice Standards: Forty Years of Excellence*, 23 Crim. Just. 10 (Winter 2009) 2, 3

Jed S. Rakoff, *Why Innocent People Plead Guilty*, N.Y. Review of Books, Nov. 20, 2014 15

Jenny Roberts, *Effective Plea Bargaining Counsel*, 122 Yale L.J. 2650 (2013) 18

United States Dep't of Justice, *U.S. Attorneys' Manual*, § 9-73.520 (1997) 18

U.S. Sentencing Comm'n, *2015 Sourcebook of Federal Sentencing Statistics*, Table 10 14

Virginia Legal Ethics Opinion 1876, March 19, 2015, *available at* http://www.vacle.org/opinions/1876.htm 20

INTEREST OF THE AMICUS CURIAE

The American Bar Association ("ABA") is the largest voluntary membership organization of legal professionals in the United States, consisting of more than 400,000 members from all 50 states, the District of Columbia, and other jurisdictions. Its membership includes attorneys in private firms, corporations, non-profit organizations, government agencies, and prosecutorial and public defender offices, as well as judges, legislators, and law professors. In particular, the ABA's membership includes many lawyers who are involved in criminal and immigration matters—prosecutors, defense counsel, immigration lawyers, and judges at state and federal courts of every level.[1]

Since its founding in 1878, and as one of the cornerstones of its mission, the ABA has actively sought to improve the quality of legal representation by "[p]romot[ing] competence, ethical conduct and professionalism."[2] The ABA has worked to protect

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[1] This brief is filed with the consent of both the Petitioner and the Respondent, and letters reflecting those consents have been lodged with the Clerk of this Court. Pursuant to Supreme Court Rule 37.6, counsel for *amicus curiae* states that no counsel for a party authored this brief in whole or in part and that no person or entity, other than the ABA, its members, or its counsel, has made a monetary contribution to the preparation or submission of this brief. Neither this brief nor the decision to file it reflects the views of any judiciary member of the ABA. No member of the ABA Judicial Division Council participated in the adoption or endorsement of the positions in this brief or reviewed the brief prior to filing.

[2] ABA Mission and Goals, *available at* http://www.americanbar.org/about_the_aba/aba-mission-goals.html.

rights guaranteed by the Constitution, including the Sixth Amendment's guarantee of effective assistance of counsel in criminal matters, and to protect the constitutional rights of non-citizens. *See, e.g.*, Brief for the Am. Bar Ass'n as *Amicus Curiae* In Support of Respondents, *Lafler v. Cooper* (No. 10-209) and *Missouri v. Frye* (No. 10-444), *available at* 2011 WL 3151278 (July 22, 2011); ABA Report with Resolution 115B (Immigration Law) (2002), *available at* http://www.americanbar.org/content/dam/aba/directories/policy/2002_am_115b.authcheckdam.pdf.

The consensus views embodied in the ABA Standards for Criminal Justice represent a critical aspect of the ABA's efforts to improve the quality of the criminal justice system. In 1964, the ABA created the Criminal Justice Standards Project under the leadership of then-ABA president and future Justice Lewis F. Powell, Jr. "From the beginning of the project, the Standards have reflected a consensus of the views of representatives of all segments of the criminal justice system." Martin Marcus, *The Making of the ABA Criminal Justice Standards: Forty Years of Excellence*, 23 Crim. Just. 10, 14 (Winter 2009).[3] A decade later, Chief Justice Warren E. Burger described the Standards as "a balanced, practical work intended

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[3] The ABA Standards for Criminal Justice became official ABA policy after approval by vote of the ABA's House of Delegates ("HOD"). The HOD consists of nearly 600 representatives from states and territories, state and local bar associations, affiliated organizations, and ABA sections, divisions, and members, among others. Over the years, the ABA has amended the Standards by the same process. *See* House of Delegates, General Information, *available at* http://www.americanbar.org/groups/leadership/delegates.html.

to walk the fine line between the protection of society and the protection of the constitutional rights of the accused individual." Warren E. Burger, *Introduction: The ABA Standards for Criminal Justice*, 12 Am. Crim. L. Rev. 251, 252 (1974). Since then, the ABA has revised the Standards multiple times through the work of broadly representative task forces consisting of judges, prosecutors, defense lawyers, academics, and lawyers with federal, state, and local perspectives. The Standards process has expanded to include liaisons from the U.S. Department of Justice and the National Association of Attorneys General, among others, to participate in the revision and drafting.

"Prevailing norms of practice as reflected in American Bar Association standards and the like . . . are guides to determining what [performance of counsel] is reasonable." *Strickland v. Washington*, 466 U.S. 668, 688 (1984). While the ABA Standards do not purport to establish the constitutional baseline for effective assistance of counsel, they are "valuable measures of the prevailing professional norms of effective representation, especially as these standards have been adapted to deal with the intersection of modern criminal prosecutions and immigration law." *Padilla v. Kentucky*, 559 U.S. 356, 366–67 (2010); *see also id.* at 377 (Alito, J., concurring) (while "we may appropriately consult standards promulgated by [the ABA]," it is this Court's "task [to] determin[e] what the Constitution commands"). By 2009, state and federal courts had already cited to the ABA Standards more than 3100 times. Marcus, *supra*, at 11. Since *Strickland*, this Court "has relied on the Standards in fashioning and applying constitutional criminal litigation rules at least ten times." Rory K. Little,

ABA's Project to Revise the Criminal Justice Standards for the Prosecution and Defense Functions, 62 Hastings L.J. 1111, 1113 (2011).

Notably, the ABA revised the Standards to reflect this Court's recent jurisprudence in *Padilla* by adding a specific standard to safeguard against the likelihood that non-citizen defendants would suffer prejudice due to erroneous advice regarding the immigration consequences of their decisions. *See generally* ABA Standards for Criminal Justice: Prosecution Function and Defense Function (4th ed. 2015) (hereinafter "Prosecution Function Standard" or "Defense Function Standard"), *available at* http://www.americanbar.org/groups/criminal_justice/standards.html. Because the constitutional question presented in this case has serious implications for fulfilling the Sixth Amendment's promise of effective assistance of counsel, the ABA respectfully submits this brief.

SUMMARY OF ARGUMENT

The question in this case is the one left unanswered after *Padilla*: whether a defendant who received bad legal advice and pleads guilty to a crime—thereby unknowingly subjecting himself to permanent deportation—can be prejudiced by that decision, notwithstanding strong evidence of guilt.

To show prejudice under *Strickland*, a defendant must show that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Padilla*, 559 U.S. at 366 (quoting *Strickland*, 466 U.S. at 694). The Court of Appeals here in essence adopted a categorical rule—holding that, as a matter of law, Petitioner could *never* show prejudice, because he confronted strong evidence against him and a near-certain conviction at trial. This categorical approach is inconsistent with both this Court's jurisprudence and the ABA Standards. In fact, a defendant who receives incorrect advice about the immigration consequences of a plea can suffer prejudice under *Strickland* in at least two important ways.

First, having received incorrect advice, a defendant cannot make an informed decision about whether to accept a plea offer or to proceed to trial. In this case, Petitioner faced mandatory deportation if he pled guilty to the charged offense—a fact that he did not know at the time he considered the plea offer. With correct legal advice, however, Petitioner would have viewed his options differently, and rationally could have decided to take his chances at trial, rather than lose his best option at staying in the only home he has known. *Second*, with bad legal advice, a defendant is

deprived of his ability to negotiate a more favorable plea agreement in the first instance. Our adversarial system relies upon defense counsel to advise not only their clients, but also the prosecution, about collateral immigration consequences, which leads to an informed negotiation over potential pleas and sentences. Counsel's constitutionally deficient advice about the deportation consequences associated with a plea offer can both limit the number and quality of the "alternative courses of action open to the defendant," as well as preclude the defendant's "voluntary and intelligent choice" among those options. *See Hill v. Lockhart*, 474 U.S. 52, 56 (1985) (citing *North Carolina v. Alford*, 400 U.S. 25, 31 (1970)). The ABA Standards seek to safeguard against such prejudice.

ARGUMENT

A. THE ABA CRIMINAL JUSTICE STANDARDS WERE REVISED TO INCORPORATE THE REQUIREMENTS OF *PADILLA* TO PREVENT PREJUDICE TO DEFENDANTS.

The ABA Standards articulate a set of criteria with respect to a lawyer's duty to provide competent representation—including the duty to advise a non-citizen defendant about immigration consequences during plea negotiations. This Court recognized in *Padilla* that deportation is a uniquely "severe penalty" and held that the Sixth Amendment requires counsel to provide affirmative, competent advice to her client about whether his plea carries a risk of deportation. *See Padilla*, 559 U.S. at 365, 367 ("The weight of prevailing professional norms supports the view that counsel *must* advise her client regarding the risk of

deportation.") (emphasis added) (citing, among other sources, ABA Standards for Criminal Justice, Prosecution Function and Defense Function 4-5.1(a), p. 197 (3d ed. 1993); ABA Standards for Criminal Justice, Pleas of Guilty 14-3.2(f), p. 116 (3d ed. 1999) (hereinafter "Pleas of Guilty Standards")). In doing so, *Padilla* acknowledged the risk of deportation to the non-citizen defendant's decision-making. "Collateral consequences" may be of greater concern to him than a prison sentence or fine, because it may deprive him "of all that makes life worth living." *Ng Fung Ho v. White*, 259 U.S. 276, 284 (1922) (Brandeis, J.); *accord INS v. St. Cyr*, 533 U.S. 289, 322 n.48 (2001) ("[I]f a defendant will face deportation as a result of a conviction, defense counsel 'should fully advise the defendant of these consequences.'") (quoting Pleas of Guilty Standard 14-3.2, cmt., p. 75 (2d ed. 1982)).

The ABA recognized the significant impact of *Padilla* on the criminal justice system, due to the large number of non-citizens for whom convictions of certain offenses can lead to deportation or removal. *See* ABA Report with Recommendation 100C (Criminal Justice Section) at 1 nn.1, 2 (2010) (hereinafter "Report 100C") (noting that nearly one out of ten defendants is not a United States citizen and that, in areas of high immigrant population such as California, one out of every four persons residing in the state is foreign-born), *available at* http://www.americanbar.org/content/dam/aba/directories/policy/2010_am_100c.authcheckdam.pdf. The ABA also understood the challenges faced by public defender offices in fulfilling *Padilla*'s mandate, due to the lack of attorneys skilled in immigration law in such offices and the financial impossibility of hiring immigration counsel. *See id.* at 10–11. As a result, in

August 2010, the ABA House of Delegates urged local, state, and federal funding, training, and pro bono services to assist lawyers in advising their clients about the immigration consequences of criminal proceedings. *See* ABA Recommendation 100C (Criminal Justice Section) (2010); *see also* Report 100C at 4–5 (discussing "many examples of basic immigration strategies that are designed to give the prosecution what is required, while avoiding making the defendant removable or ineligible for relief from removal").

In 2015, the ABA published Defense Function Standard 4-5.5 ("Special Attention to Immigration Status and Consequences"). In response to *Padilla*, the ABA specifically crafted this new Standard to expand upon the already existing Standards. It states:

> (a) Defense counsel should determine a client's citizenship and immigration status. . . . .
>
> (b) If defense counsel determines that a client may not be a United States citizen, counsel should investigate and identify particular immigration consequences that might follow possible criminal dispositions. Consultation or association with an immigration law expert or knowledgeable advocate is advisable in these circumstances. Public and appointed defenders should develop, or seek funding for, such immigration expertise within their offices.
>
> (c) After determining the client's immigration status and potential adverse consequences from the criminal proceedings, including removal, exclusion, bars to relief from removal, immigration detention, denial of citizenship, and

> adverse consequences to the client's immediate family, counsel should advise the client of all such potential consequences *and determine with the client the best course of action for the client's interests and how to pursue it.*
>
> (d) If a client is convicted of a removable offense, defense counsel should advise the client of the serious consequences if the client illegally returns to the United States.

Defense Function Standard 4-5.5 (emphasis added). The ABA also added other Standards, aimed at preventing or mitigating client prejudice caused by ineffective assistance of counsel. *See, e.g.*, Defense Function Standard 4-5.4 ("When defense counsel knows that a consequence is particularly important to the client, counsel should advise the client as to whether there are procedures for avoiding, mitigating or later removing the consequence . . . . ").

Finally, given that non-citizen juvenile defendants may suffer unique prejudice due to their youth and inexperience, the ABA House of Delegates also passed a resolution: (i) urging courts to ensure that defense counsel advise the juvenile client of the "varying [immigration] consequences that may flow from different dispositions of the case" and the availability of any relief from the same and to seek, when practicable, to minimize adverse consequences, and (ii) encouraging local bar associations and others to train judges, prosecutors, defense lawyers, and legal aid lawyers about the same and to support efforts to provide resources to defense counsel and agencies to provide their juvenile clients effective representation

that satisfies *Padilla*.[4] ABA Resolution 104E (Criminal Justice Section) (2013) at 1–2, *available at* http://www.americanbar.org/content/dam/aba/publishing/abanews/13606040182013_hod_midyear_meeting_104erevised.authcheckdam.pdf.

B. THE ABA STANDARDS RECOGNIZE THAT IT IS RATIONAL FOR A DEFENDANT TO CHOOSE TRIAL OVER MANDATORY AND PERMANENT DEPORTATION.

The prejudice inquiry under *Strickland* requires a fact-specific analysis: the petitioner must convince a fact-finder that a decision to reject the plea bargain and go to trial would have been rational under the circumstances. *Roe v. Flores-Ortega*, 528 U.S. 470, 485–86 (2000) (citing *Strickland*, 466 U.S. at 695–96). The new ABA Defense Function Standard 4-5.5 similarly presumes that one client's willingness to accept certain immigration consequences of a plea may vary from the next—but that it is each client's informed decision to make, depending upon his factual circumstances. Factual circumstances may include family obligations, financial resources, and conditions in the country to which a defendant will be returned. For example, an individual facing deportation to England has a different analysis than an individual facing deportation to South Sudan. *See, e.g.*, Defense

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[4] For example, ABA practitioners found that some juvenile defendants entered pleas unaware that they were not United States citizens. And, at least one juvenile only learned her actual immigration status years later when detained by immigration authorities. *See* ABA Report with Resolution 104E (Criminal Justice Section) (2013) at 2.

Function Standard 4-6.1(b) ("[C]ounsel should consider the *individual circumstances of the case and of the client*, and should not recommend to a client acceptance of a disposition offer unless and until appropriate investigation and study of the matter has been completed") (emphasis added).

The ABA's Standards and policy guidance, including their client-specific approach, is based upon the practical experiences of ABA members that a rational non-citizen may, under certain circumstances, reject a plea offer guaranteeing mandatory deportation in favor of a jury trial, even in the face of strong evidence of guilt: "[A] plea deal that might otherwise seem attractive—for example, a suspended one-year sentence for misdemeanor theft—may often look considerably different once it is determined that that plea would in fact be deemed an 'aggravated' felony conviction leading to the alien client's swift deportation." Pleas of Guilty Standard 14-1.4, cmt., p. 58 n.96. This Court has similarly recognized that some defendants may accept the risk of a longer sentence in order to plead to a non-deportable offense. *See Padilla*, 559 U.S. at 364, 368 ("[D]eportation is an integral part—indeed, sometimes the most important part—of the penalty that may be imposed on noncitizen defendants who plead guilty to specified crimes . . . '[p]reserving the client's right to remain in the United States may be more important to the client than any potential jail sentence.'" (quoting *St. Cyr*, 533 U.S. at 322) (second alteration in original)). This calculus makes sense, given the severity of deportation, which is "the equivalent of banishment or exile." *Delgadillo v. Carmichael*, 332 U.S. 388, 391 (1947).

Broad-based ABA practitioner experience teaches that a rational defendant may decide for a host of reasons to "roll the dice" on a jury to avoid the draconian result of permanent deportation. The defendant (and his counsel) may believe that the court will suppress key evidence or make favorable evidentiary rulings, that his credibility will hold great sway with a jury of his peers, that he can undermine the credibility of a key government agent or informant, or merely that a jury will acquit or hang, especially in the case of a first-time, non-violent drug offender, such as Petitioner. To many defendants, taking a chance at trial is rational when deportation is, at minimum, a life sentence away from family and friends, and possibly entails loss of liberty or even life. As the ABA has previously noted, some "immigrant defendants would trade any concern in order to avoid removal . . . . A defendant can only make this crucial decision if he or she understands the potential criminal and immigration penalties." Report 100C at 6; *accord Padilla v. Commonwealth* ("*Padilla II*"), 381 S.W.3d 322, 330 (Ky. Ct. App. 2012) ("[F]or Padilla, exile is a far worst [sic] prospect than the maximum ten year sentence."). Faced with certain loss, it is rational to throw the "Hail Mary" survival pass, even if the odds of success are low. *See generally People v. Martinez*, 304 P.3d 529, 531, 535 (Cal. 2013), *as modified on denial of reh'g* (Sept. 11, 2013) ("[B]ecause 'the test for prejudice considers what the defendant would have done, that a more favorable result was not reasonably probable is only one factor for the trial court to consider when assessing the credibility of a defendant's claim that he or she would have rejected the plea bargain if properly advised.'").

Here, Petitioner's paramount desire to avoid deportation to South Korea, as well as his first-time offender status and strong familial and business ties to the United States, may well have tipped the balance in favor of trial.[5] *See, e.g.*, *Ortega-Araiza v. State*, 331 P.3d 1189, 1194 (Wyo. 2014) (observing that it was "entirely reasonable" for defendant "to reject the plea and insist on going to trial (or seek a different plea agreement with lesser deportation consequence) as he was facing deportation whether he was convicted pursuant to a plea agreement or as a result of a trial. Better to gamble on an acquittal at trial, than the assured conviction and deportation resulting from a guilty plea"); *Commonwealth v. DeJesus*, 9 N.E.3d 789, 797 (Mass. 2014) ("If an assessment of the apparent benefits of a plea offer is made, it must be conducted in light of the recognition that a non-citizen defendant confronts a very different calculus than that confronting a United States citizen.").

In contrast, the Court of Appeals essentially disregarded the fact-specific nature of the prejudice inquiry and, in effect, established a *per se* rule—that a defendant's low likelihood of prevailing on the merits at trial rendered that factor dispositive in analyzing *Strickland*'s second prong, regardless of the particular context. In other words, it is always irrational for a defendant charged with a deportable offense and facing strong evidence of guilt to proceed to trial rather than take a plea deal requiring deportation, "despite his very strong ties to the United States." Pet. App. 10a. While

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[5] The government conceded below that Petitioner's trial counsel provided ineffective assistance. Brief for Petitioner at 2, 11; Pet. App. 75a.

strong evidence against a defendant is certainly a relevant factor in his decision making, it is not the only factor. And the weight a defendant assigns to that factor will vary from defendant to defendant.

Trial counsel's ineffective assistance foreclosed Petitioner of the opportunity to freely and intelligently choose whether to exercise his constitutional right to a trial by a jury of his peers. The ABA Standards seek to prevent such deprivations and to ensure that all non-citizen defendants are competently advised about immigration consequences, so that they can make a "voluntary and intelligent choice among the alternative courses of action." *Hill*, 474 U.S. at 56.

C. INCOMPETENT ADVICE ABOUT THE IMMIGRATION CONSEQUENCES OF A PLEA MAY DEPRIVE A DEFENDANT OF THE ABILITY TO PROPOSE ALTERNATIVE SENTENCES THAT AVOID DEPORTATION.

The ABA Standards and policy guidance also recognize that criminal cases are overwhelmingly resolved by plea negotiations and that such negotiations can be an ongoing and dynamic process. When the Court decided *Padilla*, ninety-five percent of cases were resolved by plea bargain. *Padilla*, 559 U.S. at 372 n.13. That number has increased, at least in federal cases. *See* U.S. Sentencing Comm'n, *2015 Sourcebook of Federal Sentencing Statistics*, Table 10 (97.1% of cases resolved by plea bargain). The plea bargaining process is guided not only by defense counsel's duty to his client, but also by the prosecutor's ability to consider holistically the facts of an individual defendant's situation, once he or she is made aware of

those facts. *See* Prosecution Function Standard 3-1.2(b) ("The duty of the prosecutor is to seek justice . . . not merely to convict.").[6] Prosecutors also have an interest in the finality of convictions and ensuring that the correct result is reached in all cases.

Today's criminal justice system bears little relationship to what the Founding Fathers envisioned, with the jury trial as its centerpiece. In reality, "our criminal justice system is almost exclusively a system of plea bargaining, negotiated behind closed doors and with no judicial oversight." Jed S. Rakoff, *Why Innocent People Plead Guilty*, N.Y. Review of Books, Nov. 20, 2014 (advocating the involvement of magistrate judges in the plea bargaining process, due to the arbitrary nature of the "current system of prosecutor-determined plea bargaining"). Thus, the Sixth Circuit's premise that the only options available to Petitioner were a binary choice between the offered plea agreement and trial was particularly flawed. Pet. App. 7a–8a; *cf. United States v. Kwan*, 407 F.3d 1005, 1017–18 (9th Cir. 2005), *abrogated on other grounds by Padilla*, 559 U.S. at 356 (noting that non-citizen defendant "could have gone to trial or renegotiated his plea agreement to avoid deportation; he could have pled guilty to a lesser charge, or the parties could have stipulated that Kwan would be sentenced to less than one year in prison").

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[6] *See also* ABA Report with Recommendation 103E (Criminal Justice Section) (2007) (urging federal, state, and local governments to assist defense counsel and prosecutors "in advising clients of the collateral consequences of criminal convictions during representation"), *available at* http://www.americanbar.org/content/dam/aba/directories/policy/2007_my_103e.authcheckdam.pdf.

Indeed, the ABA Standards recognize that competent counsel must at least understand the need to propose an alternative sentence that does not involve deportation, when available. Defense counsel and prosecutors are encouraged to consult with each other about such a disposition. *See* Prosecution Function Standard 3-4.1(a) ("The prosecutor should have and make known a general policy or willingness to consult with defense counsel concerning disposition of charges by plea."); Pleas of Guilty Standard 14-3.1, cmt., p. 105 ("[A] refusal to negotiate with defendants is inconsistent with the ABA's . . . Standards and with efficient judicial administration.").

ABA policy further acknowledges that "[i]n many cases it is possible to identify a plea . . . that is roughly equivalent to the one charged but is safer for immigration purposes." Report 100C at 4. Defense counsel can negotiate a plea to a different charge or one requiring more incarceration yet avoiding deportation. *See* Pleas of Guilty Standard 14-3.1(c), p. 101. For example, in federal court, defense counsel often negotiate a sentence of one year plus one day, rather than only one year, which makes the defendant eligible for "good time" credits and an early release. *See* Report 100C at 4. However, for the non-citizen defendant, such a sentence may trigger harsh deportation consequences. Instead, if a person has been charged with an offense that becomes an aggravated felony only if the court imposes a sentence of one year or more, he may request a sentence of 364 days, thereby preserving

the possibility for relief from deportation.[7] *See id.* On remand from this Court, the Kentucky Court of Appeals acknowledged a similar possibility in Padilla's case. *Padilla II*, 381 S.W.3d at 330 ("[H]ad the immigration consequences of Padilla's plea been factored . . . trial counsel may have obtained a plea agreement that would not have the consequence of mandatory deportation."); *accord Kwan*, 407 F.3d at 1017 ("[H]ad counsel and the court been aware that a nominally shorter sentence would enable [the defendant] to avoid deportation, there is a reasonable probability that the court would have imposed a sentence of less than one year.").

Defense counsel who advises her client competently can shape the dialogue with prosecutors and help develop alternative charging or plea options that avoid deportation, thereby aiding the defendant and, oftentimes, other interests of justice.

> By bringing deportation consequences into this [plea bargaining] process, the defense and prosecution may well be able to reach

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[7] In Petitioner's case, Mr. Lee pled guilty to one count of unlawful possession with intent to distribute MDMA (ecstasy), in violation of 21 U.S.C. § 841(a)(1). The district court sentenced Mr. Lee to a period of incarceration of twelve months and one day. *Lee v. United States*, Petition for Writ of Certiorari ("Pet.") at 7; *accord* Pet. App. 51a, 57a. Petitioner's defense counsel testified that he was not aware that a guilty plea to a violation of Section 841(a)(1) would result in mandatory deportation. *Id.* at 54a. Because counsel was not aware of this fact, he apparently did not explore with the government whether Petitioner could plead guilty to a different, non-deportable crime. (Any conviction to the original charge, an aggravated felony, would have required deportation.)

> agreements that better satisfy the interests of both parties. . . . Counsel who possess the most rudimentary understanding of the deportation consequences of a particular criminal offense may be able to plea bargain creatively with the prosecutor in order to craft a conviction and sentence that reduce the likelihood of deportation, as by avoiding a conviction for an offense that automatically triggers the removal consequence.

Padilla, 559 U.S. at 373; *see also generally* Pleas of Guilty Standard 14-4.1, p. 141 (noting that diversion may be appropriate when "the interests of justice will be served," including when "the needs of the offender and the government can be better met outside the traditional criminal justice process"); Jenny Roberts, *Effective Plea Bargaining Counsel*, 122 Yale L.J. 2650 (2013) (discussing *Padilla* and other cases and analyzing the role of defense counsel in plea negotiations).

Defense counsel's lack of understanding or misunderstanding about immigration consequences also can limit a defendant's options, because a prosecutor may not even consider plea options which avoid deportation, unless defense counsel raises the issue. *See, e.g.*, United States Dep't of Justice, *U.S. Attorneys' Manual*, § 9-73.520 (1997) (for immigration violations, federal prosecutors should seek the deportation of all deportable non-citizen criminals, absent extraordinary circumstances). ABA guidance supports the view that it is not always irrational for a defendant to reject a plea offer requiring deportation, despite strong evidence of guilt, because the defendant

may very well have sought an alternative sentence that avoids deportation.

D. INEFFECTIVE ASSISTANCE OF COUNSEL HARMS NOT ONLY THE DEFENDANT, BUT THE CRIMINAL JUSTICE SYSTEM AS WELL.

As this Court observed in *Padilla*, the impact of incompetent counsel is far broader than just harm to the defendant—it harms the adversarial criminal justice system itself:

> It is our responsibility under the Constitution to ensure that no criminal defendant—whether a citizen or not—is left to the "mercies of incompetent counsel." To satisfy this responsibility, we now hold that counsel must inform her client whether his plea carries a risk of deportation. *Our longstanding Sixth Amendment precedents, the seriousness of deportation as a consequence of a criminal plea, and the concomitant impact of deportation on families living lawfully in this country demand no less.*

Padilla, 559 U.S. at 374 (emphasis added) (citations omitted).

Despite the different criminal justice experiences and perspectives reflected in the ABA's diverse membership, there is a consensus that the failure to inform defendants of the risk of deportation associated with plea bargains also diminishes the fairness and credibility of our criminal justice system. *See generally* Recommendation 100C ("[I]n many cases a criminal defender armed with an analysis can obtain a criminal

disposition that will satisfy the prosecution, while creating no or at least less severe adverse immigration consequences."); *accord Padilla*, 559 U.S. at 373 ("[I]nformed consideration of possible deportation can only benefit both the State and non-citizen defendants during the plea-bargaining process."). Resource-challenged prosecutorial agencies may welcome accurate information about immigration consequences from defense counsel, to negotiate alternative sentences that promote finality and serve the goals of deterrence and punishment, but impose a lesser burden on the courts and sister agencies. *See generally St. Cyr*, 533 U.S. at 322 (noting that a plea agreement grants the government numerous "tangible benefits, such as promptly imposed punishment without the expenditure of prosecutorial resources"). Indeed, since *Padilla*, some states have issued guidance that prosecutors commit ethical misconduct if they do not inform an unrepresented defendant about the need to obtain legal advice regarding immigration law consequences under certain circumstances. *See, e.g.*, Virginia Legal Ethics Opinion 1876, Mar. 19, 2015, *available at* http://www.vacle.org/opinions/1876.htm. Adopting the Sixth Circuit's approach—namely, that a first-time offender and long-time legal permanent resident with very strong ties to the United States cannot establish prejudice solely because "[t]he case against him was very strong"—would harm the criminal justice system's interests in fairness and finality which the ABA Standards aim to promote. *See, e.g.*, Prosecution Function Standard 3-8.1 (prosecutor should not defend a conviction if she believes that a miscarriage of justice associated with the conviction has occurred).

This Court can only fulfill the Sixth Amendment's promise to provide the accused, in all criminal prosecutions, "the Assistance of Counsel for his defen[s]e" by recognizing the reality that, in some circumstances, the noncitizen defendant can and will rationally choose to reject a plea offer which would result in permanent deportation. It is the defendant's voluntary and intelligent choice to make. Our Constitution demands no less.

CONCLUSION

Amicus curiae American Bar Association respectfully urges this Court to reverse the Sixth Circuit's decision.

Respectfully submitted,

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RECORD AND BRIEFS

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JAE LEE,

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UNITED STATES OF AMERICA,

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR ASIAN AMERICANS ADVANCING JUSTICE | AAJC AND OTHER IMMIGRANTS' RIGHTS GROUPS AS AMICI CURIAE IN SUPPORT OF PETITIONER

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TABLE OF CONTENTS

Page(s)

TABLE OF AUTHORITIES ii

INTEREST OF AMICI CURIAE 1

SUMMARY OF ARGUMENT 3

ARGUMENT 4

BECAUSE OF THE SINGULAR HARMS PRODUCED BY DEPORTATION, A NONCITIZEN CRIMINAL DEFENDANT COULD RATIONALLY REJECT A DEPORTATION-ENABLING PLEA DEAL EVEN WHEN THE PROSECUTION HAS A STRONG CASE 4

A. Deportation Is A Severe Penalty That Can Devastate Lives And Families 4

B. Where An Accepted Plea Deal Is At Issue, The *Strickland* Prejudice Inquiry Does Not Require That The Defendant Would Have Gone To, Or Prevailed At, Trial 8

C. It Is Eminently Rational For A Properly Informed Defendant To Reject A Deportation-Enabling Plea Deal 10

1. Jose Padilla 11

2. Elan DeJesus 13

3. Lundy Khoy 16

CONCLUSION 18

APPENDIX: List of Additional Amici Curiae 1a

TABLE OF AUTHORITIES

CASES

Page(s)

Bridges v. *Wixon*, 326 U.S. 135 (1945) 5

Commonwealth v. *DeJesus*, 9 N.E.34d 789 (Mass. 2014) 13, 14, 15, 16

DeBartolo v. *United States*, 790 F.3d 775 (7th Cir. 2015) 11

Delgadillo v. *Carmichael*, 332 U.S. 388 (1947) 13

Fong Yue Ting v. *United States*, 149 U.S. 698 (1893) 4

Hill v. *Lockhart*, 474 U.S. 52 (1985) 9

INS v. *St. Cyr*, 533 U.S. 289 (2001) 8

Lafler v. *Cooper*, 132 S. Ct. 1376 (2012) 8

Missouri v. *Frye*, 132 S. Ct. 1399 (2012) 9

Moore v. *City of East Cleveland*, 431 U.S. 494 (1977) 6

Padilla v. *Commonwealth*, 381 S.W.3d 322 (Ky. Ct. App. 2012) 11, 12, 13

Padilla v. *Kentucky*, 559 U.S. 356 (2010) 4, 5, 9, 11, 12, 13, 16

People v. *Picca*, 947 N.Y.S.2d 120 (App. Div. 2012) 16

Reno v. *American-Arab Anti-Discrimination Committee*, 525 U.S. 471 (1999) 5

TABLE OF AUTHORITIES—Continued

Page(s)

State v. *Nkiam*, 778 S.E.2d 863 (N.C. Ct. App. 2015) 10

Strickland v. *Washington*, 466 U.S. 668 (1984) 2, 9

Thomas v. *Lockhart*, 738 F.2d 304 (8th Cir. 1984) 9

United States v. *Gavilan*, 761 F.2d 226 (5th Cir. 1985) 9

Yau v. *United States*, 2012 WL 245201 (N.D. Ill. Jan. 26, 2012) 8

DOCKETED CASES

Chaidez v. *United States*, No. 11-820 (U.S.) 10

OTHER AUTHORITIES

Bahrampour, Tara, *After Run-In with Law, Cambodian Immigrant's Permanent Residency Is at Risk*, Wash. Post, Oct. 3, 2012, *available at* https://www.washingtonpost.com/local/after-run-in-with-law-cambodian-immigrants-permanent-residency-is-at-risk/2012/10/03/3ecf7ad2-0cd7-11e2-bb5e-492c0d30bff6_story.html?utm_term=.fa4e6fdffd80 16

TABLE OF AUTHORITIES—Continued

Page(s)

Baum, Jonathan, et al., *In the Child's Best Interest? The Consequences of Losing a Lawful Immigrant Parent to Deportation* (Mar. 2010), *available at* https://www.law.berkeley.edu/files/Human_Rights_report.pdf 7

Calma, Justine, *Forty Years After Resettlement, Thousands of Southeast Asian Refugees Face Deportation*, NBC News (Nov. 23, 2015 8:56 a.m.), http://www.nbcnews.com/news/asian-america/forty-years-after-resettlement-thousands-southeast-asian-refugees-face-deportation-n466376 17

Capps, Randy, et al., *Implications of Immigration Enforcement Activities for the Well-Being of Children in Immigrant Families* (Sept. 2015), *available at* http://www.migrationpolicy.org/sites/default/files/publications/ASPE-ChildrenofDeported-Lit%20Review-FINAL.pdf 7

Human Rights Watch, *Forced Apart: Families Separated and Immigrants Harmed by United States Deportation Policy* (July 2007), *available at* https://www.hrw.org/reports/2007/us0707/us0707web.pdf 7

TABLE OF AUTHORITIES—Continued

Page(s)

Imison, Paul, *The Americans Deported to a Country They Don't Know*, The Independent (Oct. 27, 2013), *available at* http://www.independent.co.uk/news/world/americas/the-americans-deported-to-a-country-they-dont-know-i-didn-t-know-the-city-or-the-language-8907606.html 5

Independent Lens: Sentenced Home (PBS television broadcast May 15, 2007) 5

Independent Lens: Sentenced Home (expanded YouTube video of PBS television broadcast May 15, 2007), https://www.youtube.com/watch?v=cdw-c097wvM 6

Koball, Heather, et al., *Health and Social Service Needs of US-Citizen Children with Detained or Deported Immigrant Parents* (Sept. 2015), *available at* http://www.migrationpolicy.org/sites/default/files/publications/Urban-Parental%20Deportation-Fieldwork%20Report-FINAL.pdf 7, 8

Leitner Center, *Removing Refugees: U.S. Deportation Policy and the Cambodian-American Community* (Spring 2010), *available at* http://www.leitnercenter.org/files/2010%20Cambodia%20Report_FINAL.pdf 5, 6, 7, 8

TABLE OF AUTHORITIES—Continued

Page(s)

Lonegan, Bryan, *American Diaspora: The Deportation of Lawful Residents from the United States and the Destruction of Their Families*, 32 N.Y.U. Rev. L. & Soc. Change 55 (2007) 6, 7

Neuman, Gerald L., *Strangers to the Constitution: Immigrants, Borders, and Fundamental Law* (1996) 5

New York City Bar, *The Immigration Consequences of Deferred Adjudication Programs in New York City* (June 2007), *available at* http://www.nycbar.org/pdf/report/Immigration.pdf 10

Southeast Asia Resource Action Center, *Lundy Khoy Receives Governor's Pardon in Virginia* (May 3, 2016), http://www.searac.org/new/lundy-khoy-receives-governors-pardon-virginia 17

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BRIEF FOR ASIAN AMERICANS ADVANCING JUSTICE | AAJC AND OTHER IMMIGRANTS' RIGHTS GROUPS AS AMICI CURIAE IN SUPPORT OF PETITIONER

INTEREST OF AMICI CURIAE[1]

Amici are 46 national and local non-profit organizations that promote equality, justice, and civil rights for immigrants.

Asian Americans Advancing Justice | AAJC (AAJC) is a national nonprofit organization founded in 1991. Based in Washington, D.C., AAJC works to ad-

[1] No counsel for a party authored this brief in whole or in part. No person other than amici or their counsel made a monetary contribution to this brief's preparation or submission. Letters from the parties consenting to the filing of this brief are on file with the Clerk.

vance and protect civil and human rights for Asian Americans and to build and promote a fair and equitable society for all. AAJC is one of the nation's leading experts on issues of importance to the Asian American community, including immigration and immigrants' rights. Along with its affiliates, AAJC works to promote justice and bring national and local constituencies together through community outreach, advocacy, and litigation.

Description of the additional 45 amici are included in the appendix to this brief. These amici are organizations that, like AAJC, work with immigrant communities that are affected by the issues in this case.

This case addresses an issue of great importance to amici and the immigrant communities on whose behalf amici advocate: the extent to which the significant harms that deportation visits upon deportees and their families are given weight in the prejudice analysis under *Strickland* v. *Washington*, 466 U.S. 668 (1984). Under current immigration statutes, families face a unique and devastating threat if any noncitizen family member gets caught up in the criminal justice system. Amici submit this brief to explain why, even where evidence of guilt is allegedly strong, the singular harms of deportation can support a finding of prejudice with regard to a noncitizen defendant's acceptance of a deportation-enabling plea deal that was premised on defective advice of counsel about the conviction's immigration consequences. The brief seeks to inform the Court of the effects of deportation and examples of those who, because of uninformed pleas to deportable offenses, have faced the prospect of deportation when it would have been strongly in their interest to refuse to plead.

SUMMARY OF ARGUMENT

As this Court has repeatedly recognized, deportation is a severe penalty that is often the most important aspect of a noncitizen's criminal conviction. It can uproot lives and rip families apart, and it can leave deportees marooned in a land they do not call their home, in which many—for reasons such as inadequate language or job skills, discrimination, and lack of contacts and familiarity with local culture—struggle to assimilate and establish a livelihood.

The consequences of this upheaval are profound. Numerous studies show that deportation visits significant emotional and financial harms on deportees and their families. For example, deportees routinely suffer from depression and post-traumatic stress disorder. And because they often possess job skills ill-suited to a foreign economy and suffer discrimination as outsiders, they can have trouble supporting themselves abroad. Meanwhile, family members left behind in the United States often lose their household's primary breadwinner. Consequences like these are naturally at the forefront of the minds of noncitizen criminal defendants who are properly advised of the deportation risk posed by the charges they face.

Unsurprisingly, then, noncitizen criminal defendants with close ties to the United States have an overriding interest in avoiding deportation, even if that means rejecting plea deals that minimize sentences, and even when the evidence of guilt may be strong. Many who have accepted deportation-enabling plea deals on deficient advice of counsel regarding the conviction's immigration consequences would have rejected those plea deals if properly counseled—and understandably so. That satisfies *Strickland*'s prejudice in-

quiry as it applies in this context: that, but for the defective assistance of counsel, the defendant would have rationally rejected the plea deal that was accepted. When everything most important in one's life rides on remaining in this country, it is rational—and likely—that one would reject a plea deal that triggers mandatory deportation.

It is true that, where the prosecution's evidence is strong, deportation may be the likely ultimate outcome in any event. But a rational decision-maker bases decisions on both risk *and* result. And for the noncitizen defendants at issue, automatically subjecting themselves to mandatory deportation is unacceptable, and certainly far less attractive than the *chance*—however slim—of a favorable outcome that would allow them to remain in this country. As illustrated by the real-world accounts in Part C of this brief, it is therefore eminently rational for such defendants to make the considered choice to reject plea deals that enable deportation.

ARGUMENT

BECAUSE OF THE SINGULAR HARMS PRODUCED BY DEPORTATION, A NONCITIZEN CRIMINAL DEFENDANT COULD RATIONALLY REJECT A DEPORTATION-ENABLING PLEA DEAL EVEN WHEN THE PROSECUTION HAS A STRONG CASE

A. Deportation Is A Severe Penalty That Can Devastate Lives And Families

This Court has "long recognized that deportation is a particularly severe 'penalty.'" *Padilla* v. *Kentucky*, 559 U.S. 356, 365 (2010) (quoting *Fong Yue Ting* v. *United States*, 149 U.S. 698, 740 (1893)). Indeed, this "'drastic measure'" is "an integral part—... sometimes the most important part—of the penalty that may be

imposed on noncitizen defendants who plead guilty to specific crimes." *Id.* at 360, 364 (footnote omitted).

Deportation's severity lies in its complete upending of the course of a life: By "'[u]prooting the alien from home, friends, family, and work,'" it "'has a far harsher impact on most resident aliens than many conceded 'punishment[s].'" *Reno* v. *American-Arab Anti-Discrimination Comm.*, 525 U.S. 471, 498 (1999) (Ginsburg, J., concurring) (quoting Neuman, *Strangers to the Constitution: Immigrants, Borders, and Fundamental Law* 162 (1996)); *see, e.g.*, *Bridges* v. *Wixon*, 326 U.S. 135, 154 (1945) ("[Deportation] visits a great hardship on the individual and deprives him of the right to stay and live and work in this land of freedom.").

A number of noncitizens who face deportation have never visited the country to which they would be deported, have no family there, and do not speak the relevant language. *See, e.g.*, Leitner Center, *Removing Refugees: U.S. Deportation Policy and the Cambodian-American Community* 14 (Spring 2010) (deportees to Cambodia) (*Leitner Report*); *Independent Lens: Sentenced Home* (PBS television broadcast May 15, 2007) 25:33-26:00 (Bill Herod, coordinator at the Returnee Assistance Project in Cambodia: deportees are "not Cambodians" but "Americans ... by experience, education, [and] language"); Imison, *The Americans Deported to a Country They Don't Know: "I Didn't Know the City or the Language,"* The Independent (Oct. 27, 2013) (Mexican deportee explaining "the day she arrived in Mexico": "'I was in shock .... I didn't know [Tijuana]; I'd forgotten most of the Spanish I learnt as a little girl. It was like being dropped in a foreign country.'"); *see also infra* Part C. The culture is foreign and assimilation is extraordinarily difficult. *See, e.g.*, *Leitner Report* 13-14, 17 (describing discrimination against deportees to Cambo-

dia, how deportees respond to "the shock of arrival," and how deportees "typically lack marketable skill sets" given Cambodia's agriculture-based economy); Lonegan, *American Diaspora: The Deportation of Lawful Residents from the United States and the Destruction of Their Families*, 32 N.Y.U. Rev. L. & Soc. Change 55, 73 (2007) ("Deportees are the object of intense scorn throughout the Caribbean, where government officials have blamed them for an increase in crime."). The upheaval leaves many struggling with depression and post-traumatic stress disorder. Lonegan, 32 N.Y.U. Rev. L. & Soc. Change at 72 ("A 2004 study ... which surveyed deportees, family members, and 'parties connected to detainees/family members' found that 70% of respondents showed symptoms of post traumatic stress disorder."); *Leitner Report* 13-14 (also discussing drug and alcohol abuse and suicides among deportees). Making ends meet is often a challenge due to discrimination and other barriers. *Leitner Report* 17 (deportees to Cambodia often lack marketable skills and are discriminated against in the job market); *Independent Lens: Sentenced Home* 55:18-55:51, 56:55-57:12 (expanded YouTube video of PBS television broadcast May 15, 2007) (Cambodian deportee Louen Lun describing how he does not have the job skills or experience to find work in Cambodia).

For many individuals, however, deportation's most significant impact is the rending apart of their families.[2] Based on data provided by the Department of Home-

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[2] In other contexts, this Court has recognized the overwhelming importance of family ties, and many legal rules are designed to honor and protect family integrity as a core American value. *See, e.g.*, *Moore* v. *City of E. Cleveland*, 431 U.S. 494, 503 (1977) ("Our decisions establish that the Constitution protects the sanctity of the family precisely because the institution of the family is deeply rooted in this Nation's history and tradition.").

land Security, Human Rights Watch estimates that, from 1997 to 2007, "at least 1.6 million family members, including husbands, wives, sons and daughters, [were] separated from loved ones by deportations" from the United States. *Forced Apart: Families Separated and Immigrants Harmed by United States Deportation Policy* 44 (July 2007). From that same data and for the same time period, it has been estimated that "more than 100,000 children have been affected by [lawful permanent resident] parental deportation." Baum et al., *In the Child's Best Interest? The Consequences of Losing a Lawful Immigrant Parent to Deportation* 4, 13 (Mar. 2010) (*Baum Report*); *see* Capps et al., *Implications of Immigration Enforcement Activities for the Well-Being of Children in Immigrant Families* v (Sept. 2015) (estimating that, between 2009 and 2013, "as many as half a million parents may have been deported, affecting a similar number of US-citizen children") (*Capps Report*).

Deportation's effects on a family's psychological and economic health can be profound. Many studies show that "children separated from parents as a result of detention and deportation" experience "psychological trauma, material hardship, residential instability, family dissolution, increased use of public benefits, and, among boys, aggression." *Capps Report* vi ("More than 90 percent of those detained and deported are men, and families usually lose a breadwinner when the father is deported."); *see Baum Report* 5-9; *Leitner Report* 14-16, 17-18; Lonegan, 32 N.Y.U. Rev. L. & Soc. Change at 71; Koball et al., *Health and Social Service Needs of US-Citizen Children with Detained or Deported Immigrant Parents* vi (Sept. 2015) (*Koball Report*). "[M]any of the spouses and partners of detained parents reported suf-

fering from depression and social isolation following the detention." *Koball Report* vii.

A noncitizen facing deportation is typically keenly aware of the devastation that removal would cause his or her family. *E.g.*, *Yau* v. *United States*, 2012 WL 245201, at *4 (N.D. Ill. Jan. 26, 2012) (defendant arguing that, "'had [he] know[n] that deportation could be a possible consequence'" of his plea deal, "'[he] would have fought [his] case to prevent this tragedy from happening'" because "the 'time of imprisonment cannot outweigh the seriousness and the potential damage of what deportation can cause to myself and my family'"); *Leitner Report* 6 (during removal hearing, deportee "spoke passionately about the family he would leave behind" and, "[w]hen informed that he would return to Cambodia, ... said '[y]ou might as well kill me here'"); *see also* *INS* v. *St. Cyr*, 533 U.S. 289, 322 (2001) ("There can be little doubt that, as a general matter, alien defendants considering whether to enter into a plea agreement are acutely aware of the immigration consequences of their convictions."). That awareness fuels the desire of many noncitizens to avoid deportation at all costs.

B. Where An Accepted Plea Deal Is At Issue, The *Strickland* Prejudice Inquiry Does Not Require That The Defendant Would Have Gone To, Or Prevailed At, Trial

Where ineffective assistance revolves around an accepted plea deal, the question of *Strickland* prejudice is not limited to whether the defendant would ultimately succeed at trial. Although that inquiry is relevant, this Court's precedents make clear that, as a general matter, the defendant need only "show [that] the outcome *of the plea process* would have been different with competent advice," *Lafler* v. *Cooper*, 132 S. Ct. 1376,

1384 (2012) (emphasis added), and that "a decision to reject the plea bargain would have been rational under the circumstances," *Padilla*, 559 U.S. at 372. *See Strickland* v. *Washington*, 466 U.S. 668, 691-692 (1984) (prejudice evaluated based on the "effect on *the judgment*" and the "outcome of the proceeding" generally (emphasis added)).

Nor is it proper to base a narrower prejudice inquiry on this Court's statement in *Hill* v. *Lockhart*, 474 U.S. 52 (1985), that "the defendant must show ... a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial." *Id.* at 59. That showing is required only when the defendant's specific theory of prejudice is that "ineffective assistance led him to accept a plea offer *as opposed to proceeding to trial*." *Missouri* v. *Frye*, 132 S. Ct. 1399, 1409 (2012) (emphasis added); *see id.* at 1409-1410 ("*Hill* ... applies in the context in which it arose. *Hill* does not ... provide the sole means for demonstrating prejudice arising from the deficient performance of counsel during plea negotiations.").[3]

To read *Hill* otherwise would be to ignore the reality that, "[i]n today's criminal justice system, ... the negotiation of a plea bargain, rather than the unfolding of a trial, is almost always the critical point for a defendant." *Frye*, 132 S. Ct. at 1407. And that reality is important here because there are a number of ways in

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[3] Indeed, in making its statement, the Court in *Hill* cited approvingly (474 U.S. at 59 n.**) cases framing the prejudice inquiry not in terms of whether the defendant would have opted for trial, but in terms of whether "'the result of the plea proceedings'" more generally "'would have been different.'" *United States* v. *Gavilan*, 761 F.2d 226, 228-229 (5th Cir. 1985) (asking whether defendant "would have pleaded differently"); *see also Thomas* v. *Lockhart*, 738 F.2d 304, 307 (8th Cir. 1984) (similar).

which a noncitizen criminal defendant, properly informed of the deportation consequences of a plea deal, might negotiate with the prosecution to secure more favorable terms—including a plea to a nondeportable offense. Pet. Br. 19-24; *see also* Am. Immigration Lawyers Ass'n Br. 21-22, *Chaidez* v. *United States*, No. 11-820 (U.S. July 23, 2012), 2012 WL 3041307 (describing experience of Andy Song, who was able to negotiate a new plea deal that avoided deportation consequences after his earlier deportation-enabling plea deal was voided on the basis of ineffective assistance of counsel); New York City Bar, *The Immigration Consequences of Deferred Adjudication Programs in New York City* 7-9 (June 2007) (multi-jurisdiction survey of pre-plea diversion programs that serve as "meaningful alternatives to *both* incarceration *and* deportation").

C. It May Be Eminently Rational For A Properly Informed Defendant To Reject A Deportation-Enabling Plea Deal

In light of the frequently drastic consequences of deportation for a long-time resident of this country, it is reasonable for certain defendants to reject a deportation-enabling plea deal. Focusing instead on only the strength of the evidence of guilt ignores a fundamental feature of any rational risk-reward calculus: the magnitude of the reward should the risk pay off. Where a noncitizen defendant faces certain deportation under a plea deal, and the harms of deportation are sufficiently dire, he or she can rationally—and will likely—choose to reject that deal even if the risk of doing so is high, given that the potential reward (acquittal or conviction of a lesser, non-deportable offense) is of immense value. *State* v. *Nkiam*, 778 S.E.2d 863, 873-874 (N.C. Ct. App. 2015) (adopting this view and collecting cases); *see also*

DeBartolo v. *United States*, 790 F.3d 775, 778 (7th Cir. 2015) ("DeBartolo unquestionably wants to roll the dice, which is strong evidence that he also would have chosen to roll the dice four years ago had he known about the deportation threat. He faces the same risk of conviction and a long sentence now that he did then.").

The examples below illustrate why. The individuals described, because of their strong ties to this country, exemplify the set of deportees for whom "'preserving the ... right to remain in the United States [is] more important'" than anything else, even the risk of a longer term of incarceration. *Padilla*, 559 U.S. at 368.

1. **Jose Padilla**

One vivid example of the rationality of rejecting a plea to a deportable offense, notwithstanding strong evidence of guilt, comes from this Court's own decision in *Padilla*. Jose Padilla, a native of Honduras, has been a lawful permanent resident of the United States for over 40 years and served with honor during the Vietnam War. *Padilla*, 559 U.S. at 359. "He resides in California with his wife, three disabled children and elderly mother-in-law. He has three adult children, one with his current wife, and two by a previous marriage. Since his arrival in the United States, he has spent only two weeks in Honduras." *Padilla* v. *Commonwealth*, 381 S.W.3d 322, 324 (Ky. Ct. App. 2012) (*Padilla II*).

In 2001, while working as a self-employed truck driver, Padilla was stopped by a police officer who "noticed that Padilla did not have a KYU number[,] appeared nervous[,] ... [and] was 'off route.'" *Padilla II*, 381 S.W.3d at 327. "During a consensual search of the truck cab, ... a box fell and tore." *Id.* "The police contend that the box revealed only a white styrofoam inner

package while Padilla contends that drugs were plainly visible. According to Padilla, after the drugs were visible, he was asked what was in the load and responded 'maybe, drugs.' The police contend that the question was asked and answered before the drugs were visible." *Id.* "It is undisputed that the search of the truck revealed a substantial quantity of marijuana." *Id.* Padilla claimed that he did not know about the marijuana because "[h]e had no right to inspect the load's contents and checked only for its quantity and weight." *Id.*

After his arrest, "Padilla pleaded guilty to various marijuana-related charges, including trafficking in more than five pounds of marijuana"—a deportable offense. *Padilla II*, 381 S.W.3d at 324. His counsel provided erroneous advice on the immigration consequences of the trafficking offense, however, and thus Padilla did not know when he made the plea that the offense was deportable. *Id.* at 324, 327; *see also Padilla*, 559 U.S. at 359-360. While serving his prison sentence, he brought an ineffective-assistance claim based on his counsel's misadvice. Padilla's claim eventually reached this Court, which held that the claim satisfied *Strickland*'s performance prong. *Padilla*, 559 U.S. at 369.

On remand, the trial court ruled against Padilla on the prejudice inquiry. *Padilla II*, 381 S.W.3d at 328. It did so because it deemed the evidence of guilt to be strong, which led it to conclude that "'[a] rational defendant would not have risked a [greater] sentence ... by insisting on going to trial in this case'" in light of "'the overwhelming likelihood of conviction.'" *Id.*

The Kentucky Court of Appeals agreed that the evidence of guilt was strong, but found prejudice because of the drastic consequences deportation would have for Padilla and his family. *Padilla II*, 381 S.W.3d at 328-

330; *see id.* at 329 ("Necessarily, the court must consider the importance a particular defendant places upon preserving his or her right to remain in this country."). It noted that, "for Padilla, exile is a far wors[e] prospect than the maximum ten year sentence." *Id.* at 330. It credited his testimony that pleading guilty and facing certain deportation was essentially 'putting a gun' to his head and [that], if he had known of the deportation consequences, he would have insisted on going to trial." *Id.* It also found persuasive the testimony of "Padilla's wife and daughter[,] [who] confirmed that Padilla's banishment from this country was a death sentence for their life as a family." *Id.*

That decision was correct. It gave proper weight to this Court's recognition that, "for a noncitizen defendant and, particularly a legal permanent resident facing deportation, the 'stakes are ... high and momentous,'" "'equivalent of banishment or exile,'" and thus, in many instances, prejudice exists even in the face of strong evidence of guilt, as "'preserving the ... right to remain in the United States '[is] more important to the [defendant] than any jail sentence.'" *Padilla II*, 381 S.W.3d at 329 (first ellipsis and second brackets in original) (quoting *Padilla*, 559 U.S. at 368; *Delgadillo* v. *Carmichael*, 332 U.S. 388, 391 (1947)). This Court should confirm this reality-driven understanding of a noncitizen's preferences—which gives due weight to the severity of deportation, *supra* Part A—in the context of *Strickland* prejudice.

2. Elan DeJesus

Elan DeJesus was born in the Dominican Republic in 1983 and moved to the United States with his family at the age of eleven. *Commonwealth* v. *DeJesus*, 9 N.E.3d 789, 792 (Mass. 2014). He has lived in Boston

ever since. *Id.* "All of ... [his] family members reside in the United States," including, at the time of his guilty plea, a wife and daughter (his wife later became pregnant). *Id.* He "attended Boston public schools and graduated from Boston English High School," after which he "maintained steady employment with a parcel shipping company." *Id.* "[A]t the time of his arrest, he had been employed for eight years loading boxes onto trucks." *Id.* The arrest was his first. *Id.*

The arrest occurred after police officers stopped a van that DeJesus was driving. *DeJesus*, 9 N.E.3d at 792. The sole passenger had an outstanding warrant and was arrested. *Id.* DeJesus "agreed to accompany the officers to the police station, where police searched him, reach[ed] into his groin area and recover[ed] a small bag containing white powder." *Id.* He "was then placed under arrest and ultimately indicted for trafficking in cocaine, twenty-eight grams or more, an offense that at that time carried a five-year mandatory minimum sentence of incarceration in State prison." *Id.*

DeJesus's lawyer told him "that any guilty plea would make him 'eligible for deportation.'" *DeJesus*, 9 N.E.3d 792. On the day of the plea hearing, however, his lawyer "was unavailable ... , and [DeJesus] appeared in court with an attorney who worked in [his lawyer]'s office; substitute counsel did not discuss with [DeJesus] the immigration consequences of his plea." *Id.* DeJesus "pleaded guilty to the lesser included offense of possession of cocaine with intent to distribute and was sentenced to two and one-half years' probation." *Id.* at 792-793.

"[W]hile [he was] on probation, [DeJesus] was arrested for driving with a suspended license. Following his arrest, the defendant was taken into the custody of

Federal immigration authorities, placed in removal proceedings, and ordered to be removed from the United States." *DeJesus*, 9 N.E.3d at 793. While "awaiting removal ... , he filed [a] motion for a new trial seeking to withdraw his guilty plea" on the basis that his lawyer had been ineffective in failing to warn that he would be subject to mandatory deportation as a result of his plea. *Id.* He argued that the consequences were severe: He had "'been living in the United States since he was a child and all his family and friends live here,'" and that "'[r]emaining in the United States [was] more important to him than any jail sentence he could have received under [the] charges.'" *Id.*

Both the trial court and the Supreme Judicial Court of Massachusetts ruled in DeJesus's favor. *DeJesus*, 9 N.E.3d 793-798. Regarding prejudice, the Supreme Judicial Court held that "the findings establish the presence of 'special circumstances' showing that the defendant 'placed, or would have placed, particular emphasis on immigration consequences in deciding whether to plead guilty.'" *Id.* at 797. It relied in particular on findings that DeJesus "was 'very concerned' ... about the risk of deportation, and that [he] 'had a lot to lose if he were to be deported' because he had been in the country since he was eleven years old, his family was in Boston, and he had maintained steady employment in the Boston area." *Id.* And it "reject[ed] the Commonwealth's argument ... that the defendant was not prejudiced notwithstanding these circumstances because he 'got a very good deal'" (in that "he received straight probation when he was facing a mandatory minimum sentence of five years of incarceration"). *Id.* Instead, it stressed that "an assessment of the apparent benefits of a plea offer ... must be conducted in light of the recognition that a noncitizen defendant confronts a very different calculus than that

confronting a ... citizen": "For a noncitizen defendant, preserving his 'right to remain in the United States may be more important ... than any jail sentence.'" *Id.* (quoting *Padilla*, 559 U.S. at 368).

This analysis accords with this Court's decisions. And it adopts the perspective of a rational defendant by considering both the risks *and* the results. *People* v. *Picca*, 947 N.Y.S.2d 120, 129 (App. Div. 2012) ("[t]he determination of whether to plead guilty is a calculus, which takes into account all of the relevant circumstances," and thus neither "seemingly strong evidence" nor a plea bargain favorable from a noncitizen's perspective "necessarily requires a finding that the defendant was not prejudiced by ... counsel's failure to advise" regarding "the removal consequences of [a] plea"). Where immigration consequences are dire, noncitizen defendants like DeJesus might rationally risk higher sentences rather than automatically subject themselves to mandatory deportation.

3. Lundy Khoy[4]

Lundy Khoy immigrated to the United States at the age of one. She was born in a refugee camp in Thailand; her parents were fleeing the Khmer Rouge genocide in Cambodia. She and her parents are lawful permanent residents, and her brother and sister, who were born in the United States, are citizens.

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[4] Khoy has provided a signed letter attesting to the account in this brief. The letter is on file with counsel for amici and is available at the Court's request. Her experience has also been reported by major news outlets. *E.g.*, Bahrampour, *After Run-In with Law, Cambodian Immigrant's Permanent Residency Is at Risk*, Wash. Post, Oct. 3, 2012.

In 2000, while a freshman at George Mason University, Khoy's then-boyfriend gave her some ecstasy pills. By the next day, she was arrested. After the arresting officer found seven pills on Khoy's person, Khoy—afraid of upsetting her parents by admitting that she was using ecstasy herself—falsely told the officer that she intended to sell the pills to friends. She was charged with possession with intent to distribute and pleaded guilty on the advice of counsel, who knew Khoy was a noncitizen but did not inform her of the potential immigration consequences. The judge ultimately sentenced Khoy to three months in jail and four years of probation, acknowledging that she was not a drug dealer, just someone who was "'young and dumb'" who had made "'a big mistake.'" Calma, *Forty Years After Resettlement, Thousands of Southeast Asian Refugees Face Deportation*, NBC News (Nov. 23, 2015 8:56 a.m.).

Almost four years later, as Khoy was continuing college and her probation was nearing its end, immigration authorities detained her during a visit to her parole officer. She ended up spending nine months in immigration detention, after which she was released because, notwithstanding her removal order, Cambodia would not issue her travel documents. Since then, Khoy has received a simple pardon—mentioning her "commitment to good citizenship"—from the Governor of Virginia. Because the pardon has not erased Khoy's criminal record, however, she can still be deported. *See* Southeast Asia Res. Action Ctr., *Lundy Khoy Receives Governor's Pardon in Virginia* (May 13, 2016).

Had Khoy had been informed of the deportation consequences of her plea, she would have explored other options, including going to trial, notwithstanding arguably strong evidence against her (her own misguided

confession). That decision would have been rational. Khoy considers America her home. She has never been to Cambodia. She knows no one there. She does not read or write Khmer. Her parents barely speak English and rely on her to translate for them and take care of daily tasks. Although Khoy would have faced an uphill battle at trial, it would not have been irrational to take that risk or pursue other options (such as a plea to a different, non-deportable offense) when the consequence of pleading guilty—mandatory deportation—was certain.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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APPENDIX

APPENDIX

LIST OF ADDITIONAL AMICI CURIAE

The American-Arab Anti-Discrimination Committee (ADC) is the country's largest Arab American civil rights organization, with members from all 50 states and multiple chapters nationwide. Founded in 1980 by U.S. Senator James Abourezk, ADC is a non-partisan and secular non-profit grassroots organization. ADC has been at the forefront of protecting the Arab-American community for over thirty-five years against discrimination, racism, and stereotyping.

America's Voice Education Fund (AVEF) is a national 501(c)(3) organization that seeks to harness the power of American voices and American values to enact policy change that guarantees full labor, civil, and political rights for immigrants and their families. It works in partnership with progressive, faith-based, labor, civil rights, and grassroots groups, networks, and leaders, as well as a large number of online activists that includes both immigrants and native-born citizens.

Asian American Bar Association of San Francisco Bay Area (AABA) is one of the largest Asian American bar associations in the nation and one of the largest minority bar associations in the State of California. From its inception in 1976, AABA and its attorneys have been actively involved in civil rights issues and community service. AABA joins this amicus brief because AABA believes non-citizen defendants and their families are entitled to a remedy for mistaken pleas that accounts for harms of deportation in all cases. Indeed, U.S. immigration policy has long recognized the importance of family unity, and AABA believes that the same legal principle should apply in assessing whether

defendants are prejudiced by mistaken pleas that permanently separate them from family members.

Asian American Community Services (AACS) is a community-based organization in Central Ohio that seeks to improve the well-being and quality of life of Asian/Pacific Islanders through a broad range of social services, education, and community outreach. Every day, AACS works to address the various social, linguistic, cultural, and other barriers faced by our clients, who consist largely of immigrants and children and grandchildren of immigrants. AACS understands the critical need to ensure that the civil rights of all immigrants are respected.

Asian Americans Advancing Justice – Atlanta (formerly Asian American Legal Advocacy Center or AALAC) is the first non-profit law center dedicated to Asian immigrants and refugees (Asian Americans) in the Southeast. Its goal is to engage, educate and empower underrepresented Asian Americans and increase their civic participation. It is one of five independent organizations that make up the national Asian Americans Advancing Justice.

Asian Americans Advancing Justice – Los Angeles (Advancing Justice – LA) is the nation's largest legal and civil rights organization for Asian Americans, Native Hawaiians, and Pacific Islanders (NHPI). Founded in 1983 as the Asian Pacific American Legal Center, Advancing Justice – LA serves more than 15,000 individuals and organizations every year. Through direct services, impact litigation, policy advocacy, leadership development, and capacity building, Advancing Justice – LA focuses on the most vulnerable members of Asian American and NHPI communities while also building a strong voice for civil rights and social justice. Advanc-

ing Justice – LA provides assistance in several areas of law, including immigration relief and deportation defense.

The Asian Pacific American Bar Association of Pennsylvania (APABA-PA), formerly the Asian American Bar Association of the Delaware Valley, is a non-profit organization founded in 1984 to serve a wide network of Asian Pacific American attorneys. APABA-PA is dedicated to the professional, economic, social and educational advancement of Asian Pacific American lawyers and to promote the administration of justice for the Asian Pacific American community. The APABA-PA also educates its members and the community about issues critical to Asian Pacific Americans.

Asian Pacific American Labor Alliance, AFL-CIO (APALA) is the first and only national organization of AAPI union members and allies to advance worker, immigrant, and civil rights. Backed by the AFL-CIO, APALA has 18 chapters and a national office in Washington, D.C. Since its founding in 1992, APALA has played a unique role in serving as the bridge between the broader labor movement and the AAPI community.

The Center for Constitutional Rights (CCR) is a national non-profit legal and educational organization dedicated to advancing and protecting the rights guaranteed by the United States Constitution and international human rights law. Founded in 1966, CCR has a long history of litigating cases on behalf of those with the fewest protections and least access to legal resources, including numerous landmark civil and human rights cases fighting for racial and immigrant justice and protection from indefinite detention and solitary confinement. CCR regularly works with immigrant communities who face distinct vulnerabilities at the in-

tersection of the criminal justice system and immigration and has brought numerous cases in this Court to ensure that non-citizens are afforded the protections established under the Constitution, including *Ziglar* v. *Abbasi*, *cert. granted*, No. 15-1359, 2016 U.S. LEXIS 6272 (Oct. 11, 2016) (decision pending) (challenging abusive conditions of immigration detention, including deprivation of non-citizens' access to counsel); *Rasul* v. *Bush*, 542 U.S. 466 (2004) (establishing federal court jurisdiction to hear non-citizens' habeas challenges to indefinite detention); and *Boumediene* v. *Bush*, 553 U.S. 723 (2008) (confirming constitutional right of non-citizen detainees to petition for habeas review).

Chinese American Citizens Alliance (C.A.C.A.), founded in 1895 with headquarters in San Francisco, is the oldest Asian American civil rights organization in the United States. C.A.C.A. has fought and advocated for the civil rights and equitable treatment of Chinese and Asian Americans for over 120 years. This case highlights the fact that the United States should and must provide and exhaust all available avenues of competent legal and judicial opportunities afforded in the Constitution to its citizens and legal residents.

Chinese American Citizens Alliance Portland Lodge (C.A.C.A. Portland), located in Portland, Oregon, is a chapter of the national C.A.C.A.

Chinese for Affirmative Action (CAA) has served immigrant communities for over 47 years, supporting immigrant community members with direct services and advocating alongside them for broader and more inclusive policy changes to our current immigration system. For the last 10 years, CAA has been part of a local network to ensure that all immigrants regardless of immigration status, income status, language ability,

or country of origin have access to trusted community based immigrant legal services. CAA advocates for not only universal representation for immigrants in deportation proceedings but also immigration representation and access to immigration counsel in criminal proceedings. As the United States continues to move toward entangling our immigration and criminal justice systems, CAA and other advocates must work to ensure that community members are well informed of the immigration consequences of their criminal proceedings to avoid situations where they face a double sentence—one through the criminal justice system and the second through the immigration system.

Council of Korean Americans (CKA) is a global network of Korean Americans dedicated to advancing issues of national importance for our community. CKA supports immigrants' rights and recognizes their contributions to society. This case underscores the harsh reality that families can be torn apart for relatively minor offenses under current immigration laws. At a time when immigrant rights are under attack, it is imperative that organizations like CKA stand up for members of its community.

Detention Watch Network (DWN) is a national coalition of organizations and individuals working to expose and challenge the injustices of the United States' immigration detention and deportation system and advocate for profound change that promotes the rights and dignity of all persons.

The Filipino Bar Association of Northern California (FBANC) is one of the oldest Filipino-American bar associations in the nation with a mission to advance equality and guard against injustices targeting not only the Filipino community, but the rights of all minority

communities. As an organization comprised of Filipino-American attorneys, judges, law professors, law students, and allies, FBANC stands in solidarity to advocate and serve immigrant families and communities.

The Fred T. Korematsu Center for Law and Equality (Korematsu Center) is a non-profit organization based at Seattle University School of Law and works to advance justice through research, advocacy, and education. The Korematsu Center is dedicated to advancing the legacy of Fred Korematsu, who defied the military orders during World War II that ultimately led to the internment of 110,000 Japanese Americans. He took his challenge of the military orders to the United States Supreme Court, which upheld his conviction in 1944 on the ground that the removal of Japanese Americans was justified by "military necessity." Fred Korematsu went on to successfully challenge his conviction and to champion the cause of civil liberties and civil rights for all people. The Korematsu Center, inspired by his example, works to advance his legacy by promoting social justice for all. It has a special interest in promoting fairness in the courts of our country. That interest includes ensuring effective assistance of counsel, especially when legal advice is given that has consequences relating to the detention or removal of individuals, many of whom have extensive ties to the United States. The Korematsu Center does not, in this brief or otherwise, represent the official views of Seattle University.

The Hispanic National Bar Association (HNBA) is comprised of thousands of Latino lawyers, law professors, law students, legal professionals, state and federal judges, legislators, and bar affiliates across the country. The HNBA supports Hispanic legal professionals and is committed to advocacy on issues of importance to the 53 million people of Hispanic heritage living in the

United States. The HNBA regularly petitions Congress and the Executive on behalf of all members of the communities it represents.

The Illinois Coalition for Immigrant and Refugee Rights (ICIRR) is a non-profit, nonpartisan statewide organization dedicated to promoting the rights of immigrants and refugees to full and equal participation in the civic, cultural, social, and political life of our diverse society. In partnership with its member organizations, ICIRR educates and organizes immigrant and refugee communities to assert their rights; promotes citizenship and civic participation; monitors, analyzes, and advocates on immigrant-related issues; and, informs the general public about the contributions of immigrants and refugees. ICIRR has advocated for policy changes that protect immigrant families from deportation and separation and uphold their rights to due process and equal protection under the law.

The Japanese American Citizens League (JACL), founded in 1929, is a national organization whose mission is to secure and safeguard the civil and human rights of Asian/Pacific Islander communities who are affected by injustice and bigotry. The unique historical experience of Japanese American incarceration during World War II obligates the Japanese American community to address civil and human rights issues. During World War II, the experience of Japanese Americans went beyond being forced from their homes and being detained without due process. Japanese Americans were vilified and targeted because of their race. The United States abandoned them, with some being subjected to deportation. Their abandonment by the United States government left many with a mental trauma that for some would last a lifetime.

LatinoJustice PRLDEF is a national not for profit civil rights legal defense fund that has advocated for and defended the constitutional rights of all Latinos under the law. Its continuing mission since being founded in 1972 is to promote the civic participation of the greater pan-Latino community, to cultivate new Latino community leaders, and to engage in and support law reform cases addressing basic civil rights impacting Latinos, particularly in the intersection of criminal justice and immigrants' rights. It has brought several precedent-setting law reform cases protecting immigrants' rights to ensure (1) that Latinos and other immigrants receive the legal protections they are afforded under the Constitution and (2) that immigrants are treated with the same human dignity as any other resident of this country.

The Leadership Conference on Civil and Human Rights (The Leadership Conference) is a coalition of more than 200 organizations committed to the protection of civil and human rights in the United States. It is the nation's oldest, largest, and most diverse civil and human rights coalition. It was founded in 1950 by three legendary leaders of the civil rights movement—A. Philip Randolph of the Brotherhood of Sleeping Car Porters; Roy Wilkins of the NAACP; and Arnold Aronson of the National Jewish Community Relations Advisory Council. The Leadership Conference believes that the due process rights of all people in the United States, including the right to effective assistance of counsel, must be vigorously protected.

The National Asian Pacific American Bar Association (NAPABA) is the national association of Asian Pacific American attorneys, judges, law professors, and law students, representing the interests of nearly 75 state and local Asian Pacific American bar associations

and nearly 50,000 attorneys who work in solo practices, large firms, corporations, legal services organizations, nonprofit organizations, law schools, and government agencies. Since its inception in 1988, NAPABA has served as the national voice for Asian Pacific Americans in the legal profession, and has promoted justice, equity, and opportunity for Asian Pacific Americans. NAPABA advocates for the rights of immigrants and a fair and function court system, including clarifying the appropriate duties of counsel.

The National Asian Pacific American Women's Forum (NAPAWF) is the only national, multi-issue Asian and Pacific Islander (AAPI) organization for women, transgender, and gender non-conforming people in the country. NAPAWF's mission is to build a movement to advance social justice and human rights for AAPI communities. It advocates for gender and racial justice for AAPI immigrants, who are particularly vulnerable to harm within the immigration and justice systems because of discrimination, economic status, limited education and resources, and high rates of limited English proficiency.

The National Bar Association (NBA) is the nation's oldest and largest national network of predominantly African-American attorneys and judges in the United States. The NBA was founded in 1925, when there were only 1,000 African-American attorneys in the entire country and when other national bar associations, such as the American Bar Association, did not admit African American attorneys. Throughout its history, the NBA has advocated consistently on behalf of African Americans and other minority populations. The NBA represents approximately 66,000 lawyers, judges, law professors, and law students, and it has over eighty affiliate chapters throughout the world.

The National Center for Lesbian Rights (NCLR) is a national legal non-profit organization committed to advancing the civil and human rights of lesbian, gay, bisexual, and transgender (LGBT) individuals and their families. Since 1994, NCLR's Immigration Project has provided free legal assistance to thousands of LGBT immigrants nationwide through, among other services, direct representation of LGBT immigrants in impact cases and individual asylum cases and advocacy for immigration and asylum policy reform. NCLR has published papers on the topic of gender and sexual orientation-based violence and discrimination, and has filed briefs, both as amicus and as counsel of record, regarding asylum claims based on rape, domestic violence, and other forms of gender and sexual orientation-based persecution before various federal courts.

National Council of Asian Pacific Americans (NCAPA) is a coalition of 34 national Asian Pacific American organizations around the country. Based in Washington, D.C., NCAPA serves to represent the interests of the greater Asian American (AA) and Native Hawaiian Pacific Islander (NHPI) communities and to provide a national voice for the communities' concerns. Asian Americans are part of this country's rich immigration history. Nearly two-thirds of Asian Americans are foreign-born, and since 2010, more immigrants are from Asian countries than of any other origin. NCAPA rejects enforcement-only approaches to immigration, including proposals and initiatives that scapegoat immigrants and separate families.

The National Council of Jewish Women (NCJW) is a grassroots organization of 90,000 volunteers and advocates who turn progressive ideals into action. Inspired by Jewish values, NCJW strives for social justice by improving the quality of life for women, chil-

dren, and families and by safeguarding individual rights and freedoms. NCJW's Resolutions state that NCJW resolves to work for "[c]omprehensive, humane, and equitable immigration, refugee, asylum, and naturalization laws, policies, and practices that facilitate and expedite legal status and a path to citizenship for more individuals." Consistent with its Principles and Resolutions, NCJW joins this brief.

National Council of La Raza (NCLR) is the largest national Hispanic civil rights and advocacy organization in the United States. NCLR conducts applied research, policy analysis, and advocacy, providing a Latino perspective on key issue areas, and has a long history of fighting for civil rights at the federal and state levels. NCLR's Affiliate Network of nearly 300 community-based organizations—operating in 37 states and the District of Columbia—provides education, healthcare, housing, workforce development, immigration, and other services to millions of Americans and immigrants annually. NCLR believes that family unity is a national value and interest that strengthens the country.

The National Employment Law Project (NELP) is a non-profit legal and research organization that has for more than 45 years advocated for the employment and labor rights of low-wage, unemployed, and immigrant workers. NELP seeks to ensure that all workers, and especially the most vulnerable ones, receive the full protection of labor laws, and that employers are not rewarded for skirting those basic rights. NELP's areas of expertise include the workplace rights of immigrants, and NELP has testified in Congress regarding these matters and has litigated directly and participated as amicus in numerous cases before the federal courts of appeals and the United States Supreme

Court. A holding against the right of immigrants to a full understanding of their rights and the deportation repercussions of a given action is contrary to the fundamental principles of the United States and harms all immigrants, as well as the communities where they live and work.

National Immigrant Justice Center (NIJC), a program of the Heartland Alliance for Human Needs and Human Rights, is a non-profit organization accredited by the Board of Immigration Appeals since 1980 to provide immigration assistance. NIJC provides free and low-cost legal services to approximately 8,000 noncitizens per year, and represents hundreds of noncitizens who are placed into removal proceedings as a result of guilty pleas in state criminal courts. NIJC also offers no-cost training and consultation to criminal defense attorneys representing noncitizens, to train and advise regarding the immigration consequences of particular convictions.

National Justice for Our Neighbors is a network of immigration legal service organizations across the country. Together it operates more than fifty free or low-cost legal clinics serviced by thirty-four immigration attorneys, and engages in advocacy and education that promote immigrant rights. It understands the sweeping effects of a criminal conviction and the life-altering consequences of deportation for its clients.

The National Korean American Service and Education Consortium (NAKASEC) was founded as a consortium in 1994 by local community centers who realized that only by coming together can Korean and Asian Americans build and contribute to a national movement for civil rights. Its mission is to organize Korean and Asian Americans to achieve racial, economic, and social

justice. One of its signature organizing and advocacy issue areas is immigrant rights and keeping immigrant families together.

The National LGBT Bar Association (LGBT Bar) is a non-partisan, membership-based professional association of lawyers, judges, legal academics, law students and affiliated lesbian, gay, bisexual and transgender legal organizations. The LGBT Bar promotes justice in and through the legal profession for the LGBT community in all its diversity. This case stands to impact the LGBT Bar's membership both professionally and personally. As a group of both legal professionals and individuals with diverse backgrounds, the LGBT Bar acknowledges the effect this case will have not only on its immigration attorneys, but also on the families of its members, and therefore finds it necessary to vocalize its support of the petitioner.

The National Tongan American Society (NTAS) serves the Tongan community in Utah and throughout the United States. There have been families separated in Utah due to the types of deportations at issue in this case. NTAS seeks to keep its families together with better and fair treatment of legal cases of immigrants.

The Neighborhood Defender Service of Harlem (NDS) was founded in 1990 to represent residents of Northern Manhattan facing charges in New York County criminal courts. It represents 10,000 clients in criminal court annually, including a significant number of noncitizens requiring specific advice about the immigration consequences of criminal pleas and other dispositions. Its immigration attorneys also represent noncitizen individuals in deportation and other immigration-related proceedings. NDS advocates also represent parents facing abuse and neglect charges in New

York City family court. NDS has a significant interest in the remedies available to noncitizens who are ensnared in the criminal justice system.

NETWORK Lobby for Catholic Social Justice educates, organizes, and lobbies for social and economic transformation. Founded by Catholic Sisters in the progressive spirit of Vatican II, it is rooted in Catholic Social Justice tradition and open to all who share its passion. The NETWORK community of justice-seekers is more than 50,000 strong with members in every state and every congressional district.

The New York Legal Assistance Group (NYLAG) is a not-for-profit law office that provides free civil legal services to low-income New Yorkers who cannot afford private attorneys. NYLAG provides legal assistance in New York City in the areas of government benefits, family law, immigration, disability rights, housing law, special education, and consumer debt, among others. NYLAG's Immigrant Protection Unit (IPU) provides New York's low-income immigrant communities with comprehensive legal services through consultation and direct representation. IPU assists individuals in securing or continuing lawful status in the United States through adjustment of status and other complex legal remedies that may be available to them. IPU also aims to facilitate family reunification through family-based immigrant petitions, humanitarian parole and other forms of relief. As one of the largest immigrant services providers in the State of New York, IPU educates immigrant communities about the dangers of fraudulent immigration law practitioners and other barriers to attaining citizenship. Through its comprehensive approach, IPU seeks to broaden and improve access to quality legal representation and address the social welfare needs of New York's low-income immi-

grant community. NYLAG's Special Litigation Unit enforces the rights of immigrants in class action cases. As an organization that represents immigrants in removal proceedings, including immigrants who have taken criminal pleas, NYLAG and its clients have a strong interest in seeing the Petitioner's rights vindicated.

Northwest Immigrant Rights Project (NWIRP) is a nationally-recognized legal services organization based in Washington State. Each year, NWIRP provides direct legal assistance in immigration matters to over 9,000 low-income people from over 150 countries, speaking over 60 different languages and dialects. NWIRP also strives to achieve systemic change to policies and practices affecting immigrants through impact litigation, public policy work, and community education. Founded in 1984, NWIRP serves the community from four offices in Washington State in Seattle, Granger, Tacoma, and Wenatchee. NWIRP is the only organization on the List of Pro Bono Legal Service Providers for Washington State that is distributed to unrepresented individuals facing removal proceedings by the local immigration court. NWIRP has a deep interest in the subject of this litigation because it provides legal assistance each year to thousands of individuals facing removal proceedings.

OCA–Asian Pacific American Advocates (OCA) is a national, membership-driven organization dedicated to advancing the social, political, and economic wellbeing of Asian Pacific Americans. Through its 100 chapters and affiliates across the nation, OCA engages in policy advocacy, community organizing, and programming to advance the civil rights of Asian Pacific Americans, including immigrant rights and immigrant integration.

The Service Employees International Union (SEIU) is an international labor organization representing approximately two million working men and women in the United States and Canada employed in the private and public sectors. Many of SEIU's members are foreign-born U.S. citizens, lawful permanent residents, or immigrants authorized to work in the United States. Many of SEIU's members have mixed-status families.

South Asian Americans Leading Together (SAALT) is a national, nonpartisan, non-profit organization that fights for racial justice and advocates for the civil rights of all South Asians in the United States. Its ultimate vision is dignity and full inclusion for all. SAALT is the only national, staffed South Asian organization that advocates for South Asian communities through a social justice framework. SAALT has been a national voice in addressing immigrant rights. The South Asian community includes many who are non-citizens and vulnerable to prejudicial and discriminatory practices within the judicial system that may result in mandatory deportation without fair due process. SAALT and its colleagues who join this brief believe that non-citizen defendants should have accurate legal advice about deportation consequences. SAALT stands with the Petitioner in the pursuit of protecting the rights of immigrants and their families.

The South Asian Bar Association of North America represents the lawyers, law students, judges and legal academics with their roots in South Asia. It provides a vital link for the South Asian community to the law and the legal system. Because its membership is composed primarily of immigrants and the children of immigrants, it has a special interest in protecting the rights

of those communities and in promoting outcomes policies that take their special circumstances into account.

The Southeast Asia Resource Action Center (SEARAC) is a national organization that advances the interests of Cambodian, Laotian, and Vietnamese American communities who came to this country as the largest group of refugees ever resettled in the United States. Due to challenges upon initial resettlement, SEARAC's communities have historically struggled with high rates of poverty, post-traumatic stress disorder, and poor educational outcomes, funneling many young people into the prison-to-deportation pipeline. SEARAC has been an outspoken advocate in the movement to end unjust, mandatory detention and deportation. SEARAC strongly believes in a judicial system that ensures due process for all immigrants and refugees, and joins its colleagues in this amicus brief in support of stronger legal protections for the most marginalized communities.

The Texas Civil Rights Project (TCRP) uses legal advocacy to empower communities and create policy change in Texas. In its twenty-five-year history, TCRP has brought thousands of strategic lawsuits, defending voting rights, fighting institutional discrimination, and reforming systems of criminal justice. TCRP's efforts have helped countless low-income and historically marginalized Texans, including immigrant families. Recently, for example, TCRP settled a lawsuit against the State of Texas for refusing to issue birth certificates to babies born in Texas to undocumented mothers, representing dozens of immigrant families from the Rio Grande Valley and the organization La Unión del Pueblo Entero, and working with Texas Rio Grande Legal Aid. Without birth certificates, families lived in constant fear of separation and

could not receive access to basic education, health, religious and childcare services. Given TCRP's history, mission and dedication to advancing equality and justice, TCRP has a strong interest in seeing the Petitioner's rights vindicated for his own benefit and for that of millions of immigrants and their families throughout the country.

United Food and Commercial Workers International Union, AFL-CIO, CLC (UFCW) is an unincorporated association and labor organization representing approximately 1.3 million workers. UFCW is composed of members, local unions, and other chartered bodies throughout the United States. UFCW represents immigrants from many nations, including noncitizens. UFCW members work primarily in retail, meatpacking, food processing, and poultry. UFCW believes that immigrants charged with crimes may face harsher consequences following a felony conviction because certain sentences result not only in prison but also deportation which separates families. In such circumstances, ineffective assistance of counsel has heightened consequences when erroneous legal advice as to whether to accept a plea leads to deportation.

RECORD AND BRIEFS.

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JAE LEE,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF OF THE CATO INSTITUTE AS *AMICUS CURIAE* SUPPORTING PETITIONER

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QUESTION PRESENTED

Is it always irrational for a criminal defendant to pursue trial against overwhelming evidence of guilt, on his belief that an independent jury verdict may acquit him in spite of such evidence?

TABLE OF CONTENTS

QUESTION PRESENTED i

TABLE OF AUTHORITIES iv

INTEREST OF *AMICUS CURIAE* 1

SUMMARY OF ARGUMENT 1

ARGUMENT 5

I. The Original Public Meaning of the Sixth Amendment's Right to Trial Contemplates an Independent Jury's Right to Acquit Regardless of the Strength of Evidence 5

A. The Court of Appeals Was Wrong to Treat *Strickland* as Disqualifying a Rational Defendant from Seeking an Independent Jury Strategy 5

B. The Sixth Amendment Presumes a Jury that Decides Both "Law and Fact" in Its Verdict to Acquit or Convict 8

C. The Jury's Power to "Nullify" Remains Even If Modern Courts and Lawyers Do Not Instruct Juries on It 14

1. Joe Morissette's Innocent Mistake 16

2. John David Mooney's Good Deed Goes Punished 18

3. Amy Shutkin and the Community Jury 20

II. It Remains Rational Under the Circumstances for Defendants Such as Lee to Seek Independent Jury Verdicts 21

A. The *Strickland* Prejudice Inquiry Asks for Rational Choices, Not Judicially-Endorsed Ones 21

B. The Sixth Circuit's *Per Se* Rule Excluding Consideration of the Possibility of Nullification Distorts the Flexible and Fact-Bound *Strickland* Inquiry 23

C. Lee's Circumstances Are Precisely Those Where It Could Be Rational to Consider an Independent Jury Verdict 25

D. Seeking a Jury's Discretion is Fundamentally as Rational as Seeking Prosecutorial Discretion 27

CONCLUSION 31

TABLE OF AUTHORITIES

Page(s)

Cases

Collins v. Youngblood,
497 U.S. 37 (1990) 9

DeBartolo v. United States,
790 F.3d 775 (2015) 2, 22, 26

District of Columbia v. Heller,
554 U.S. 570 (2008) 9

Horning v. District of Columbia,
254 U.S. 135 (1920) 15

Hyde v. United States,
225 U.S. 347 (1912) 6

McDonald v. City of Chicago,
561 U.S. 742 (2010) 9

Missouri v. Frye,
132 S. Ct. 1399 (2012) 24

Mooney v. Frazier,
693 S.E.2d 333 (W. Va. 2010) 20

Mooney v. United States,
497 F.3d 397 (4th Cir. 2007) 19

Neder v. United States,
527 U.S. 1 (1999) 16

Padilla v. Kentucky,
559 U.S. 356 (2010) ..... *passim*

People v. Croswell,
3 Johns. Cas. 336 (N.Y. Sup. Ct. 1804) 3, 12, 13

Peugh v. United States,
133 S.Ct. 2072 (2013) 9

Roe v. Flores-Ortega,
528 U.S. 470 (2000) 22

Sparf v. United States,
156 U.S. 51 (1895) 14

Strickland v. Washington,
466 U.S. 668 (1983) 2, 5, 6, 24

United States ex rel. McCann v. Adams,
126 F.2d 774 (2d Cir. 1942) 3

United States v. Alvarez-Valdez,
No. CR 13-0431 RB (D.N.M. June 14, 2013) 29

United States v. Gaudin,
515 U.S. 506 (1995) 15

United States v. Morissette,
342 U.S. 246 (1952) 16-17, 18

United States v. Moylan,
417 F.2d 1002 (4th Cir. 1969) 7

United States v. Salazar,
751 F.3d 326 (5th Cir. 2014) 15

United States v. Sams,
104 F.3d 1407, 1996 WL 739013 (D.C. Cir. 1996) 25

United States v. Spock,
416 F.2d 165 (1st Cir. 1969) 15

Watts v. United States,
362 A.2d 706 (D.C. 1976) 24

Other Authorities

Albert Alschuler & Andrew G. Deiss, *A Brief History of the Criminal Jury in the United States*, 61 U. Chi. L. Rev. 867 (1994) 10

Alschuler & Deiss, A Brief History of the Criminal Jury in the United States, 61 U. Chi. L. Rev. 867 (1994) .....

C.F. Adams, THE WORKS OF JOHN ADAMS (1856) (written Feb. 12, 1771) 13, 14

Clay Conrad, *Jury Nullification: The Evolution of a Doctrine* (1998) 11-12

D.C. Bar Ethics Op. 320, *Jury Nullification Arguments by Criminal Defense Counsel* (May 2003) 25

Declaration of Independence (1776) 11

Glenn Harlan Reynolds, *Review Essay: Of Dissent and Discretion*, 9 Cornell J. L. & Pub. Pol'y 685 (2000) 24, 27

Herbert Mitgang, *Inside the Jury Room*, N.Y. Times (Apr. 8, 1986) https://goo.gl/7DVYqV 28

James Wilson, *Collected Works* 1000 (Liberty Fund, Kermit L. Hall & Mark David Hall eds., 2007) 13

Lawrence M. Friedman, History of American Law (2d ed.) (1985) 8

Letter from Office of the Attorney General for the District of Columbia to Lee Levine (Jan. 11, 2013) http://wapo.st/2jsT3Fq 30

Luke 1:28 (New English Standard Bible) 23

NOAH WEBSTER'S DICTIONARY OF THE ENGLISH LANGUAGE (1st ed., 1828) 12

Oakland Needle Exchange Workers Acquitted, San Francisco Chronicle (Mar. 11, 1995), https://goo.gl/EDL56U 20, 21

Paula Hannaford-Agor & Valerie Hans, *Nullification at Work? A Glimpse from the National Center for State Courts Study of Hung Juries*, 78 Chi.-Kent L. Rev 1249 (2003) 28

Rachel E. Barkow, *Criminal Trials*, in *Heritage Guide to the Constitution* 340 (David F. Forte & Matthew Spalding, eds. 2d ed. 2014) 13

Strickland v. Washington, Oyez, https://www.oyez.org/cases/1983/82-1554 (audio of oral argument) (last visited Feb. 7, 2017). 6

Thomas Andrew Green, *Verdict According to Conscience: Perspectives on the English Criminal Trial Jury 1200-1800* (1985) 10

Thomas Regnier, *Restoring the Founders' Ideal of the Independent Jury in Criminal Cases*, 51 Santa Clara L. Rev. 775 (2011) 12

United States v. AU Optronics Corp., No. 3:09-CR-0110-SI (N.D. Cal.) (Doc. #489, filed Dec. 6, 2011), United States' Motion in Limine #10 to Preclude Jury Nullification Arguments 29

INTEREST OF *AMICUS CURIAE*[1]

Amicus Cato Institute is a non-partisan public policy research foundation that was established in 1977 to advance the principles of individual liberty, free markets, and limited government. Cato's Center for Constitutional Studies was founded in 1989 to restore the principles of constitutional government that are the foundation of liberty. Toward those ends, Cato holds conferences and publishes books, studies, and the annual *Cato Supreme Court Review*.

This case concerns Cato because a key aspect of the decision below implicates the fundamental independence of jury decisions in criminal cases. This independence, including a jury' right to "nullify" in certain cases, lies at the core of the original understanding of the right to jury trial guaranteed by the Sixth Amendment. Cato submits this brief to call the Court's attention to this aspect of the holding below. *Amicus* is in a unique position to elucidate this issue because it is the only institution to have published a book length historical and doctrinal treatment of American jury independence or "nullification."

SUMMARY OF ARGUMENT

This case presents important issues of individual liberty, the role of juries, and the original public meaning of the Sixth Amendment's right to a jury trial. In its decision below, the Sixth Circuit held *inter alia* that when a criminal defendant is faced with

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[1] Rule 37 statement: Petitioner has filed a general consent for all *amicus* briefs. Respondent gave written consent to this filing, which is filed concurrently with this brief. No counsel for any party authored this brief in whole or in part. No person or entity other than *amicus* funded its preparation or submission.

very strong evidence, it is never rational for him to reject a guilty plea to pursue trial and seek a jury's acquittal by "nullification." This conclusion conflicts with the history and foundational understanding of the right to jury trial in the Sixth Amendment, and has no basis in this Court's precedents. The rule pursued by the lower court effectively rewrites the Court's prejudice test under *Strickland v. Washington*, 466 U.S. 668 (1983)—which asks only whether going to trial would be "rational *under the circumstances*," *Padilla v. Kentucky*, 559 U.S. 356, 372 (2010) (emphasis added) (citing *Strickland*)—and instead relies on dicta in *Strickland* to justify its derogation from that standard.

In deciding the question presented, the Court should not ignore the divide between the Sixth Circuit below and the Seventh Circuit's holding in *DeBartolo v. United States*, 790 F.3d 775 (2015), with respect to considering juror "nullification" as part of *Strickland*'s prejudice inquiry. *Amicus* urges the Court to hold that there are cases, such as this one, where it is *rational under the circumstances* for a defendant to seek a jury verdict of acquittal even against seemingly "overwhelming" evidence. It should hold that *Strickland* did not negate a fundamental part of the original public meaning of the Sixth Amendment; that part of a defendant's right to jury trial necessarily includes the full range of possible jury verdicts. Defendants choosing to exercise their right to the verdict of an independent American jury may in some cases be unwise; nevertheless, theirs is an exercise of the Sixth Amendment "jury" right in the full sense in which it was originally understood.

The lower court also added an unnecessary *per se* test to *Strickland* that screens out defendants seeking independent jury verdicts of acquittal. In so doing, the decision below confuses modern judicial disapproval of "nullification" arguments with the rationality of pursuing a jury's *sua sponte* nullification itself.[2] It elides the fact that "under the circumstances" of Lee's case are factors making a jury acquittal far more likely than in other potential "nullification" cases. Finally, it ignores the close parallelism between prosecutorial discretion and jury discretion, both of which introduce "a slack into the enforcement of law, tempering its rigor by the mollifying influence of current ethical conventions." *United States ex rel. McCann v. Adams*, 126 F.2d 774, 776 (2d Cir. 1942) (Hand, J.) (discussing the importance of jury trials), *rev'd on other grounds*, 317 U.S. 269 (1942). Ignoring this parallelism has the illogical effect of treating a defendant seeking a jury's discretion in a sympathetic case as being far different from such a defendant seeking a prosecutor's charging discretion under the same circumstances.

To modern lawyers, to speak of the importance of the jury as a "slack" in the system, or even of its ability to "nullify," may seem antiquated. Alexander Hamilton argued in 1804 that "the jury have an undoubted right to give a general verdict, which decides both law and fact . . . [and] it is also their duty to exercise their judgments upon the law, as well as the fact." *People v. Croswell*, 3 Johns. Cas. 336, 345–46 (N.Y. Sup. Ct. 1804). Such an argument today, if

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[2] By "*sua sponte* nullification," we mean a jury "nullifying" in its verdict without instruction on its power to do so from the court or by argument from defense counsel.

made to a jury, might cause a modern trial judge to hold Hamilton in contempt. Yet despite the common prohibition today on speaking of "nullification" in court, the modern jury yet retains this fundamental power that Hamilton proclaimed to be its "duty." Juries remain powerfully independent; they continue to render general verdicts that acquit or convict as to each count. Juries are not forced to explain the basis for their verdicts, and their verdicts to acquit are unreviewable as a matter of law. Essentially the same jury power and discretion extolled by the Framers—including Hamilton, John Adams, and James Wilson—remains alive and well.

The government argues, among other things, that Lee cannot go forward with the trial he seeks because his only hope would be the possibility of a jury exercising its discretion to acquit him in the face of overwhelming evidence, labeled "nullification." The Court of Appeals agreed, because it felt bound by a dictum from *Strickland*. This Court should reverse that judgment. In addition to acknowledging the other foundational reasons a defendant in Lee's position may have to go to trial, *amicus* urges the Court to clarify that seeking an independent jury's possible acquittal based on "nullification" can be rational under the circumstances. It is not, in other words, a strategy disqualified *under the Sixth Amendment*.

ARGUMENT

I. The Original Public Meaning of the Sixth Amendment's Right to Trial Contemplates an Independent Jury's Right to Acquit Regardless of the Strength of Evidence

A. The Court of Appeals Was Wrong to Treat *Strickland* as Disqualifying a Rational Defendant from Seeking an Independent Jury Strategy

The Sixth Circuit judged that Lee was irrational to pursue a trial only in hopes of acquittal "from the off chance of jury nullification or the like." Pet. App. 3a. It ultimately held that "jury nullification may [not] be considered when evaluating whether a petitioner has shown *Strickland* prejudice," because *Strickland* itself had included a comment that criminal defendants have "no entitlement to the luck of a lawless decisionmaker." Pet. App.7a (quoting *Strickland v. Washington*, 466 U.S. 668 695 (1984)). Implicit in the court's reasoning are two key errors: First, *Strickland*'s reference to the "lawless decisionmaker" was mere *dictum*, an aside that decided nothing at issue in that case; and second, a properly impaneled jury that acquits—for whatever reason—is by definition a "law[ful] decisionmaker."

The decision below cites *Strickland*'s note regarding "the luck of a lawless decisionmaker" as its sole reason for declaring that Lee cannot rely on a possible acquittal by a nullifying jury to establish prejudice. Pet. App. 7a. That note is *dictum*, and not due any reliance as precedent. The *Strickland* prejudice inquiry asks whether counsel's ineffective performance was "prejudicial to the defense in order to con-

stitute ineffective assistance." 466 U.S. at 692. This test has later been refined to ask if rejection of a guilty plea in favor of trial would be "rational *under the circumstances*" for the defendant. *Padilla v. Kentucky*, 559 U.S., 356 372 (2010) (citation omitted) (emphasis added). That is the test under the Court's precedents, and the one that should have been applied.

But instead of asking whether it was rational under the circumstances for a defendant in Lee's position to go to trial, the lower court relied on the statement in *Strickland* that in performing the "prejudice" inquiry it could not consider "the possibility of arbitrariness, whimsy, caprice, 'nullification,' and the like." 466 U.S. at 695. This statement, along with the aside about "a lawless decisionmaker," had no bearing on arguments or facts raised in the capital murder sentencing hearing at issue in *Strickland*. There was not even a jury in *Strickland* where "nullification" could ever have been at issue; Washington pled guilty and was narrowly challenging his attorney's performance before a bench hearing on sentencing. 466 U.S. at 700. Finally, the briefs in *Strickland* made no argument regarding the practice of juror nullification, nor that there was a chance for an "arbitrar[y], whims[ical], or capric[ious]" juror to save Washington. And no such issues were raised at oral argument, either. *Strickland v. Washington*, Oyez, https://www.oyez.org/cases/1983/82-1554 (audio of oral argument) (last visited Feb. 7, 2017). That statement, therefore, is classic *dictum* and does not bind any courts. *See, e.g.*, *Hyde v. United States*, 225 U.S. 347, 391 (1912) (Holmes, J., dissenting) (dictum of a case "gains no new force from the repetition by text writers. It is one of the misfortunes of the law

that ideas become encysted in phrases and thereafter for a long time cease to provoke further analysis.").

The "lawless decisionmaker" *dictum* and the lumping of the possibility of "nullification" with arbitrary, whimsical, or capricious juror behavior was not briefed, argued, or based on anything before the Court; it was completely tangential and unnecessary to deciding *Strickland* and the lower court was wrong to treat it as determinative. Because this was the sole justification for the Sixth Circuit to reject the contention that Lee could rely on a nullification stratagem, it leaves the court without any argument to prohibit Lee from doing so. This is especially so under the circumstances of his case, when the court below otherwise acknowledged the "real" chances Lee might have with a jury. Pet. App. 7a ("Such possibilities, real as they are, are irrelevant") (citation and internal quotation marks omitted).

The second error the lower court made was to employ this *dictum* to characterize instances of juror independence or "nullification" as akin to arbitrary, whimsical, or capricious juror behavior. These latter adjectives are not descriptive of the hallowed juror independence known to the Framing generation that debated and ratified the Sixth Amendment, as we explain *infra*. To the public of that era, and indeed under current federal law, a jury that acquits is rendering a final and binding general verdict, decisive of legal and factual issues. It is always rendering a "law[ful] decision[]" and that decision is respected as such by courts and society. *See United States v. Moylan*, 417 F.2d 1002, 1006 (4th Cir. 1969) ("We recognize . . . the undisputed power of the jury to acquit, even if its verdict is contrary to the law as given by

the judge and contrary to the evidence. This is a power that must exist as long as we adhere to the general verdict in criminal cases, for the courts cannot search the minds of the jurors to find the basis upon which they judge."). A truly capricious jury, one deciding a case by casting lots or rolling dice, may be thought of as "arbitrary" or even "lawless." But a jury exercising its inherent power to render a verdict on the whole of a case cannot be so described simply because a trial judge may disagree with its verdict. It cannot be dubbed "lawless" when this practice is part and parcel of the Sixth Amendment's idea of what a trial by "jury" means." *See* See Lawrence M. Friedman, History of American Law (2d ed.), at 285 (1985) ("This type of behavior has been called jury lawlessness; but there is something strange in pinning the label of 'lawless' on a power so carefully and explicitly built into the law.").

B. The Sixth Amendment Presumes a Jury that Decides Both "Law and Fact" in Its Verdict to Acquit or Convict

Despite the decision below acknowledging the wealth of history underlying jury "nullification" in American criminal courts, the Court of Appeals adopts the government's characterization of the practice as arbitrary, lawless, and not fit for consideration. This description contravenes the constitutional pedigree and history of the practice. The original conception of a right to trial by "jury" that was to be protected by the ratification of the Sixth Amendment encompassed precisely such a trial strategy. Through this lens, the Sixth Circuit's instant dismissal of the concept within the *Strickland* framework makes little sense. It cannot be the case that a historic practice

considered an intrinsic part of the right to jury trial by the Framing generation could nevertheless be too "irrational" for a defendant to consider in establishing whether he has been prejudiced.

At the heart of *Strickland*'s test for ineffective assistance of counsel is the fact that "the Sixth Amendment right to counsel exists, and is needed, in order to protect the fundamental right to a fair trial." 466 U.S. at 684. What a "fair trial" means under the Bill of Rights requires understanding what the ratifying generation actually understood a trial by "jury" to mean in the criminal context.[3] This Court approaches construing the guarantees of the Bill of Rights beginning by reference to the original public meaning of the text of the guarantee. *See Peugh v. United States*, 133 S.Ct. 2072, 2081 (2013) (construing the definition of "ex post facto law" by reference to its "established meaning at the time of the framing") (quoting *Collins v. Youngblood*, 497 U.S. 37, 41 (1990)); *District of Columbia v. Heller*, 554 U.S. 570, 576-577, 628 (2008) (interpreting Second Amendment by its original public meaning). The Court has further looked to pre-revolutionary rights granted by English courts as well as specific colonial grievances to inform its construal of constitutional rights. *See McDonald v. City of Chicago*, 561 U.S. 742, 768 (2010) (discussing the

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[3] The Sixth Amendment may not have originally guaranteed a right to the "effective" assistance of counsel, but the Court has consistently assumed that *Strickland*'s framework governs such cases and has attempted to read *Strickland* in line with the amendment's original meaning the extent possible. *See, e.g., Padilla*, 559 U.S. at 389 (Scalia, J., dissenting) (questioning but assuming whether the Sixth Amendment includes the right to "*effective* assistance" of counsel) (emphasis in original).

constitutional salience of *Heller*'s exploration of the 1689 English Bill of Rights, Blackstone, and George III's attempts to disarm the colonists as informing its textual inquiry into the Second Amendment).

The colonists' pre-revolutionary mindset toward juries was one of reverence for a local, participatory feature of government that effectively put a shield between colony and Crown. Since well before the Revolution, English subjects had regarded the jury as a powerful check against arbitrary lawmaking or enforcement by the king. But none more so than the American colonists, who frequently called on local juries to invalidate odious and oppressive laws applied to the colonies. The most celebrated case involving an arguable "nullification" of English law was that involving the printer Peter Zenger in 1735, where a jury upended a seditious libel charge filed against Zenger in an obvious attempt to silence his newspaper's criticisms of the New York governor. *See* Albert Alschuler & Andrew G. Deiss, *A Brief History of the Criminal Jury in the United States*, 61 U. Chi. L. Rev. 867, 869-875 (1994) (discussing pre-Revolutionary and Framing-era attitudes toward juries and their role in nullifying oppressive English laws, which shaped the background of the right to jury trial); *see also* Thomas Andrew Green, *Verdict According to Conscience: Perspectives on the English Criminal Trial Jury 1200-1800* 365 (1985) (discussing history of the English jury and showing that by the 18th Century, "jury-based mitigation" was viewed as an official part of British criminal law).

That history, fresh in the minds of the colonists who became the Framing generation, would create a strong desire to ensure a continuation of the power-

ful, independent, local jury that the colonists had relied on to oppose oppressive English laws. The power of the colonial jury to nullify laws in this manner had also caused the Crown to expand the non-jury admiralty jurisdiction over more and more cases, leading to the familiar complaint in the Declaration of Independence of 1776 that King George III was "depriving us . . . of the benefits of trial by jury." *Declaration of Independence* ¶ 20 (1776). Therefore, the discretion of independent juries was one of the very causes for revolution, and it informed not only the original guarantee of a right to trial by jury in the Constitution of 1787, but also the Sixth Amendment of the Bill of Rights, which expanded on that guarantee.

The original meaning of what the Sixth Amendment encompassed, therefore, included the assumption that the right to trial by jury would be to an *independent jury* of the type familiar to the colonists before ratification of that Amendment. This was understood at the time to include its power to render an acquittal by general verdict, taking both law and fact into its decision. And this was not viewed as being incompatible with the court's obligation to inform the jury of the relevant law. This history of what the "jury trial" in a criminal context meant to the Framing-era citizenry directly informed what the Sixth Amendment guaranteed to the Framing generation, and it must also guide this Court's construal of the Sixth Amendment.

The Framing-era embrace of independent jury decisions is documented in the only book-length treatment of the subject by Clay Conrad. *Jury Nulli-*

fication: The Evolution of a Doctrine, 46–53 (1998).[4] Conrad traces the contemporaneous English and colonial cases informing the way criminal juries were viewed in the late 18th century, dictionary definitions of "jury," and other Framing-era statements, to canvass this original understanding. In this second regard, Noah Webster, an early pamphleteer and publisher of the earliest American dictionary of the English language, defined "petty juries" to be those who "attend courts to try matters of fact in civil causes, and to decide both the law and the facts in criminal prosecutions." *Noah Webster's Dictionary of the English Language* (1st ed., 1828).[5] With respect to the semantic meaning at the time of the Sixth Amendment's ratification, therefore, the right of jurors to render a verdict on law and fact and "according to conscience" and encompassing the whole of a case was an implicit part of what the words "jury trial" meant. Conrad, *supra*, at 47.[6]

This understanding extended to prominent members of the Framing generation, who frequently ex-

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[4] Conrad's work was published by *amicus*; there is no other treatise published on the American history of independent jury decisions, although there are many academic articles on the subject, some of which contain succinct treatments of this history. *See also* Thomas Regnier, *Restoring the Founders' Ideal of the Independent Jury in Criminal Cases*, 51 Santa Clara L. Rev. 775, 780–783 (2011) (discussing Framing-era views on jury nullification as fundamental to constitutional order).

[5] At least one English dictionary of the late 18th Century concurred with Webster's. *See* Conrad, *supra*, at 46 (discussing definition in Jacob's Law Dictionary of 1782).

[6] Early U.S. court rulings accorded in this view of criminal juries. *See, e.g.*, *Croswell*, 3 Johns. Cas. at 366–76 (1804) (Op. of Kent, J.).

tolled the virtues of the independent jury. John Adams famously wrote in his pre-Revolution journal that he considered it to be the juror's individual "duty . . . to find the verdict according to his own best understanding, judgment, and conscience, though in direct opposition to the direction of the court." C.F. Adams, *The Works of John Adams*, 253–255 (1856) (written Feb. 12, 1771).[7] The Framing generation thus often referred to the jury's role as an independent decisionmaker, and the court below acknowledged that "the unreviewable power of juries to acquit, despite strong evidence of guilt, was perhaps the central reason why the right to a jury trial in criminal cases was enshrined in the Constitution." Pet App. 5a (citing Rachel E. Barkow, *Criminal Trials*, in *Heritage Guide to the Constitution* 340, 340–41 (David F. Forte & Matthew Spalding, eds. 2d ed. 2014)).

Accordingly, the public during the Framing period understood the Sixth Amendment to guarantee a very specific form of jury trial in a criminal case: an independent, local jury rendered a general verdict on the whole of a case, judging law and fact after receiv-

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[7] Hamilton, speaking not long after the Sixth Amendment's ratification in his capacity as a defense lawyer, argued that:

> This Plea embraces the whole matter of law and fact involved in the charge, and the jury have an undoubted right to give a general verdict . . . All the cases agree that the jury have the power to decide the law as well as the fact; and if the law gives them the power, it gives them the right also . . .

Croswell, 3 Johns. Cas. at 345–46. James Wilson echoed this position, stating that "the jury must do their duty . . . they must decide the law as well as the fact." 2 James Wilson, *Collected Works* 1000 (Liberty Fund, Kermit L. Hall & Mark David Hall eds., 2007).

ing judicial instructions on applicable law. This was true even when this (rarely) meant acquitting against evidence that was arguably proven beyond reasonable doubt. *Cf.* Adams, *supra*, at 253–55. This was the original public meaning of what the rights guaranteed by the Sixth Amendment were.

The independent jury's history shows that it was designed *not* to be a merely autonomous rubberstamp on a judge's instructions but instead to exercise discretion, and this historic practice cannot be "irrational" to pursue under *Strickland*. *Strickland* derives its entire *raison d'être* from its attempt to implement the Sixth Amendment's guarantees of a right to counsel and right to a jury trial. Pursuing an independent jury decision—even under modern constraints—is far from being irrational; it is inherently a constitutional endeavor, and part of the historical understanding of the right to trial protected by that amendment.

C. The Jury's Power to "Nullify" Remains Even If Modern Courts and Lawyers Do Not Instruct Juries on It

After the early years of the Republic, enthusiasm for making juror-independence arguments to juries waned. That did not, however, change the fundamental role or power of juries, nor the rationality of seeking exercise of their power. At the turn of the century, the Court decided *Sparf v. United States*, 156 U.S. 51 (1895), holding that there was no inherent right (nor duty) to *instruct* juries on their nullifying power in terms of deciding "law." *Id.* at 105–106. *Sparf* is often cited for broader propositions, but the Court has treated its holding narrowly. Neither *Sparf* nor other modern courts thereafter have rejected the funda-

mental ability of juries to render independent verdicts of acquittal even against strong evidence.[8]

As the Court put it in 1995, almost all criminal issues are by their nature mixed questions of fact and law, or involve juries' "application of the law to the facts," so the present-day petit jury continues to render general verdicts on the case as a whole. *United States v. Gaudin*, 515 U.S. 506, 512–13 (1995). *Gaudin* rejected the government's argument that *Sparf* had limited juries to being mere fact-finders, holding instead that "the jury's constitutional responsibility is not merely to determine the facts, but to apply the law to those facts and draw the ultimate conclusion of guilt or innocence." *Id.* at 514.[9] This

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[8] Conversely, appellate courts are quick to reverse any behavior that approaches what might be considered the opposite of nullification: directed verdict in favor of the government. For example, in *United States v. Salazar*, the Fifth Circuit vacated and remanded a case where the defendant had confessed on the witness stand to the crimes charged, and the judge instructed the jury "to go back and find the Defendant guilty." 751 F.3d 326, 334 (5th Cir. 2014) ("The Sixth Amendment permits a jury to disregard a defendant's confession and still find him not guilty. . . . [and] no amount of compelling evidence can override the right to have a jury determine his guilt."). *See also United States v. Spock*, 416 F.2d 165, 180 (1st Cir. 1969) ("In a criminal case a court may not order the jury to return a verdict of guilty, no matter how overwhelming the evidence of guilt.").

[9] Even before *Gaudin*, the Court confirmed that *Sparf* did not change the original understanding that the criminal jury renders independent verdicts. While a judge has the duty and right to instruct the jury on the law, ultimately "the jury has the power to bring in a verdict in the teeth of both law and facts." *Horning v. District of Columbia*, 254 U.S. 135, 138 (1920) (Holmes, J.); *see also id.* at 139 (Brandeis, J., dissenting) ("[I]t is settled that . . . it is the duty of the jury to apply the law given them by the presiding judge to the facts they find. But it is still the rule

holding directly relied on the original understanding of jury trials. *See id.* at 513 ("Juries at the time of the framing could not be forced to produce mere 'factual findings,' but were entitled to deliver a general verdict pronouncing the defendant's guilt or innocence.").

What these precedents indicate is that the Court need not engage in debate whether jury nullification is normatively *good* or not, whether it should ever be solicited at trial, or what the judicial role is when jurors seek to nullify. This case is not *that* vehicle. Instead, what is relevant to Lee's case is that pursuit of a "nullifying" jury remains a historically-valid strategy incorporated into the Sixth Amendment's right to a jury trial and cannot be rejected as irrational.

Indeed, modern cases show the value of jury independence as an integral part of the checks built into the justice system, as well as the caution courts must exercise in prejudging a defendant's likelihood of success before a jury. *See Neder v. United States*, 527 U.S. 1, 32 (1999) (Scalia, J., joined by Souter and Ginsburg, JJ., concurring in part and dissenting in part) ("The Constitution does not trust judges to make determinations of criminal guilt.").

1. Joe Morissette's Innocent Mistake

In *United States v. Morissette*, a hunter, fruit stand operator, and veteran of the military named Joe Morissette went onto federal land and was accused of stealing spent bomb casings for salvage material that had been left on the land by the military,

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of the federal courts that the jury in criminal cases renders a general verdict on the law and the facts; and that the judge is without power to direct a verdict of guilty although no fact is in dispute.").

thinking the property abandoned.342 U.S. 246, 247–48 (1952). The government, upset that its bomb casings were taken, promptly indicted Morissette on charges of stealing and converting government property. *Id.* Morissette went to trial, maintaining that he believed the property abandoned and that he was innocent of "knowingly" converting it as the relevant statute required. But the trial judge refused to allow the jury to be instructed in any way on whether Morissette took the scrap knowingly, believing Morissette to be guilty, and instead instructed the jury that "it is no defense to claim that it was abandoned because it was on private property." *Id.* at 249. The Court of Appeals affirmed, holding that "[a]s we have interpreted the statute, appellant was guilty of its violation beyond a shadow of doubt, as evidenced even by his own admissions." *Id.*

This Court granted cert. because the case raised "questions both fundamental and far-reaching" regarding criminal law, *id.* at 247, and vacated the judgment below, ordering a new trial. Justice Jackson, writing for the majority, explicitly instructed that "the trial court may not withdraw or prejudge the issue by [its] instruction[s]" in spite of how "often [it] is tempting to cast in terms of a 'presumption' a conclusion which a court thinks probable from given facts." *Id.* at 274. This was critical, the Court thought, to avoid issuing jury instructions that "prejudge a conclusion which the jury should reach of its own volition." *Id.* at 275. Justice Jackson concluded:

> Of course, the jury . . . might have disbelieved his profession of innocent intent and concluded that his assertion of a belief that the casings were abandoned was an after-

> thought. . . . But juries are not bound by what seems inescapable logic to judges. They might have [focused on] Morissette's good character, the openness of the taking, crushing and transporting of the casings, and the candor with which it was all admitted. They might have refused to brand Morissette as a thief. Had they done so, that too would have been the end of the matter.

Id. at 276. So convinced were the lower-court judges in *Morissette* of the defendant's guilt, they could not keep themselves from putting a thumb on the scale when issuing jury instructions in his case. In rebuking this impermissible trespass into the jury's realm, it was not enough for the Court to say that the trial judge should not express or imply to the jury a more limited role than it truly had. It was also critical for a defendant's right to a jury trial to ensure that no judicial pressure was applied to a jury when, despite evidence that seemed clear and incontrovertible to judges, the jury may nevertheless choose to acquit.

2. John David Mooney's Good Deed Goes Punished

John David Mooney was an ex-felon living with a wife whose past involved frequent violence towards the men she lived with, and who kept a gun despite Mooney's own inability to do so. One night Mooney's wife, drunk and angry, put a loaded revolver to Mooney's temple before he wrested it away from her. In his attempt to turn the weapon over to the police—since he could not keep it himself, nor let his wife keep it—Mooney ended up contacting the authorities through his manager at work, walking down the

street with the firearm and conveying it to them to prevent harm to him or others. After this act of good sense and judgment, he was promptly arrested and indicted for being a felon in possession of a firearm in violation of 18 U.S.C. § 922(g)(1), which for Mooney carried a sentence of 180 months. After being misadvised, and effectively silenced by his counsel from expressing doubts about his guilt during his plea colloquy, Mooney pleaded guilty against his better judgment, thinking he had no defense at law to his charges. It turned out he did, a common law defense of justification implicitly recognized by most federal courts at the time. *See Mooney v. United States*, 497 F.3d 397, 399–401 (4th Cir. 2007).

Eventually, the Fourth Circuit upheld Mooney's collateral attack on his sentence under 28 U.S.C. § 2255 for ineffective assistance of counsel, and allowed him to withdraw his guilty plea. *Id.* at 408–09. Rather than proceed to a jury trial it would surely lose, the government dropped the case—though this was, unfortunately, after Mooney had already served five years in prison for his Samaritan actions.

Mooney's case demonstrates a situation where a judge not only got the law wrong, but attempted to limit the scope of the jury's duty to render a general verdict. The district court that originally rejected Mooney's attempt to withdraw his guilty plea during the colloquy revealed this by stating to Mooney that even if he went to trial, the judge "wouldn't let you or your lawyer argue [a justification defense] to the jury." *Id.* This error of law was not understood by Mooney or his attorney at the time, and if Mooney's wishes had been respected and he had gone to trial, the trial court would have been forced into appealable

error had it prevented him from arguing a valid defense to the jury. *Id.* In a real sense, then, only the specter of an independent jury that might have acquitted Mooney made the district judge reveal his erroneous legal views, and Mooney served five years' imprisonment for a case that the government would never have taken to trial if it was forced to do so.[10]

3. Amy Shutkin and the Community Jury

Finally, the 1995 acquittals of needle-exchange activists exemplify a jury's following its conscience in the face of an unreasonable application of law.

Amy Shutkin and her friends saw a problem in Oakland: HIV was spreading rapidly in their community, and much of it was caused by re-use of needles among the drug-using population. Against state law, Shutkin and her allies began handing out free, clean needles to those who wanted them. The local police force arrested them and charged them with distributing "drug paraphernalia." Under the statutory definitions and relevant jury instructions, the facts seemed clear that they must be convicted. Yet at trial, the jury, led by a foreman who was a retired local police officer, acquitted all five defendants. *Oakland Needle Exchange Workers Acquitted*, San Francisco Chronicle (Mar. 11, 1995), https://goo.gl/EDL56U. The foreman said later that the jury "agreed laws had been broken" by the quintet who stood trial (including Shutkin). But ultimately they decided that, as the

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[10] *Mooney v. Frazier*, 693 S.E.2d 333, 336-37 (W. Va. 2010) (answering certified questions from lower court). After his release from prison following the Fourth Circuit's vacatur of his guilty plea, Mooney sued his former counsel. This malpractice suit took at least three years to resolve despite counsel's obvious error.

San Francisco Chronicle put it, "the threat of spreading HIV infection through unclean needles is greater than the illegal acts committed by the volunteers." *Id.*

Only by the thoughtful consideration of the purpose of the law to protect the community could a reasonable jury spare these five from criminal sanction. Yet under the Sixth Circuit's rule here, seeking such a result—whether in Shutkin's case, Morissette's, or Mooney's—is always irrational from the get-go, a short-circuit to failing *Strickland*'s prejudice test.

II. It Remains Rational Under the Circumstances for Defendants Such as Lee to Seek Independent Jury Verdicts

A. The *Strickland* Prejudice Inquiry Asks for Rational Choices, Not Judicially Endorsed Ones

The jury's exercise of its independent power to "nullify" in appropriate cases need not be judicially endorsed to be recognized in the *Strickland* prejudice inquiry as a rational, historically accepted practice. This Court's precedents, and especially *Strickland*'s rendering of the Sixth Amendment right to a jury trial, fixate on touchstones of *reasonableness* and *rationality under the circumstances*. The judicial endorsement of a strategy of seeking a nullifying jury in a case, as opposed to its rationality under the circumstances, is therefore irrelevant to the prejudice inquiry. Such a test also flies in the face of the Court's repeated warnings against adding *per se* rules to *Strickland*'s fact-intensive, reasonableness inquiry.

The appropriate inquiry, under the Court's precedents, asks whether "a decision to reject the plea bargain would have been rational under the circum-

stances." *Padilla v. Kentucky*, 559 U.S. 356, 372 (2010) (citing *Roe v. Flores-Ortega*, 528 U.S. 470, 480, 486 (2000)). In other words, it asks for a judge's judgment whether a defendant in Lee's position could have "rationally" believed he would get a better result at trial than with his guilty plea. The court below answered in the negative. It held that it was irrational for Lee to be optimistic, as the evidence proffered by the government was "overwhelming," and because "nullification" is simply never rational to pursue. Pet. App. 3a–4a (twice referring to "overwhelming evidence"), 7a (rejecting "nullification" as rationale for trial).

Yet in an analogous scenario the Seventh Circuit held the precise opposite opinion, under nearly identical circumstances. In *DeBartolo v. United States*, that court held that a defendant in Lee's position could rationally opt for trial, even on a jury-independence strategy. 790 F.3d 775, 778–780. This was so even though the court expressed that it did not "condone jury nullification." *Id.* at 779. The disagreement amongst federal appellate judges as to the rationality of such a course of conduct only highlights the irrelevance of the latter to the *Strickland* prejudice test.

Lee should not be denied his right to withdraw his plea and face trial merely because he will not be able to exhort the jury to nullify directly or because judges dislike the idea of nullification. The rationality of his seeking trial comes from the fact that, as we argue

infra, his potential to prevail on such an approach far exceeds the level of a "Hail Mary." Pet. App. 4a.[11]

B. The Sixth Circuit's *Per Se* Rule Excluding Consideration of the Possibility of Nullification Distorts the Flexible and Fact-Bound *Strickland* Inquiry

Equally important, the Sixth Circuit's prejudice rule fashions a *per se* prohibition on considering a jury's possible nullification in an appropriate case. It states that no matter the circumstances, the background of the defendant, the crime itself, or community feelings toward the legal sanction in question, all such considerations are irrelevant to the rationality inquiry if the only strategy would be "nullification."

This holding creates a sort of nesting, Babushka Doll of *Strickland*'s prejudice inquiry, adding a new test hidden within the well-known, old ones: after showing that (1) there is a reasonable probability defendant would have opted for trial but for deficient advice; and (2) that it would be "rational under the circumstances" for a defendant to opt for trial; then, nested within these tests is inserted a final test (3) whether the court *approves* of the underlying strategy for success at a later trial. The Sixth Circuit's novel test flatly excludes jury nullification from being considered, discussed, or recognized—even in cases where it could be a rational option.

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[11] We presume the Court of Appeals refers to the desperate passing play in football, not the traditional Catholic prayer. The latter has a more optimistic connotation—and it probably better describes Lee's chances with a jury than the court below would have intended. *See, Luke* 1:28 (New English Standard Bible).

This unnecessarily complicates a *Strickland* inquiry that the Court has repeatedly said should be based on flexible *standards*, not *per se* rules. In an analogous part of *Strickland* the Court carefully and deliberately carved broad leeway for attorney reasonableness and strategy in representation under the *performance* prong.[12] Similarly, this Court's treatment of the prejudice prong has always been fact-specific, and avoided creating *per se* rules such as the Sixth Circuit's.[13] It contradicts three decades of *Strickland* jurisprudence to adopt a rule that *always* ignores an historically accepted and ongoing jury practice that is usually viewed as being ultimately permissible[14], and hold it to be per se "irrational" for

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[12] 466 U.S. at 689 (courts applying *Strickland* cannot "restrict the wide latitude counsel must have in making tactical decisions"); *id.* ("Judicial scrutiny of counsel's performance must be highly deferential" and avoid "second-guessing counsel's assistance"); *id.* ("[I]t is all too easy for a court, examining counsel's defense after it has proved unsuccessful, to conclude that a particular act or omission of counsel was unreasonable."); *id.* at 690 (court must "recognize that counsel is strongly presumed to have the exercise of reasonable professional judgment").

[13] *See Missouri v. Frye*, 132 S. Ct. 1399, 1401–11 (2012) (determining that *Strickland*'s prejudice inquiry is context-specific, and that the rule of *Padilla* "does not, however, provide the sole means for demonstrating prejudice arising from the deficient performance of counsel during plea negotiations.").

[14] *See, e.g., Watts v. United States*, 362 A.2d 706, 710 (D.C. 1976) ("the law permits a jury to acquit in disregard of the evidence, and . . . such an acquittal is unreviewable."). In summarizing judicial treatment of jury nullification, Prof. Glenn Reynolds has remarked that "[t]he real question is not whether juries can do this, but whether they should be told that they can do this." Glenn Harlan Reynolds, *Review Essay: Of Dissent and Discretion*, 9 Cornell J. L. & Pub. Pol'y 685 (2000) (reviewing Conrad, *Jury Nullification*, *supra*).

a defendant to pursue, even when other arguments may be unavailable.[15] As noted above, the Amy Shutkins of the world sometimes prevail with juries.

C. Lee's Circumstances Are Precisely Those Where It Could Be Rational to Consider an Independent Jury Verdict

Far from being irrational, Lee's situation is exactly that in which heading to trial on the hope of an independent jury acquitting him—including through "nullification"—could be "rational under the circumstances." *Padilla*, 556 U.S. at 372 (citation omitted). Lee's case is a sympathetic one even for the jurors who will not know that Lee's deportation is at stake.

The circumstances of Lee's case represent exactly the type of sympathetic case where another federal appellate panel held that it would be rational to go to trial. The Seventh Circuit, in *DeBartolo*, considered a defendant in a very similar and arguably worse evidentiary posture, and still believed it could be rational for a defendant to withdraw his plea, go to trial, and pursue a possible nullification verdict.

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[15] Such a rule also conflicts with bar's ethical rules on the subject. *See, e.g.*, D.C. Bar Ethics Opinion 320, *Jury Nullification Arguments by Criminal Defense Counsel* (May 2003) (stating that the ethics panel "can imagine situations in which it 'may be possible for a defense lawyer to satisfy [the effective assistance requirement through] a reasonable strategy of seeking jury nullification when no valid or practicable defense exists.'") (quoting *United States v. Sams*, 104 F.3d 1407, 1996 WL 739013 at *2 (D.C. Cir. 1996)); *id.* (criminal defense attorneys may not make arguments contravening local rules against exhorting juries to "ignore the law" but nevertheless stating that "[t]he legal system continues, however, to permit juries to exercise the power to nullify.").

In Lee's case, heading to trial on a strategy of trying to find an independent jury that would acquit him would not be an outlandish one. Far more serious levels of drug manufacturing and possession with intent to distribute were at issue in *DeBartolo*.[16] Yet three federal appellate judges agreed that it would be within the boundaries of what is "rational" for a defendant in DeBartolo's situation, to go to trial and seek jury nullification. *See* 790 F.3d at 777–780. The Court's broad canvas of what is "rational" under *Strickland* for purposes of prejudice cannot exclude Lee's judgment in the instant proceedings as well as that of the *DeBartolo* panel on the theory that what is "rational" must be what is "probable" or "wise."

The *DeBartolo* court further explained that the "rational under the circumstances" test could often be met in cases especially prone to nullification such as those involving laws that some members of a community may feel are inappropriate to apply to nonviolent, first-time offenders. *See id.*. The Sixth Circuit did not actually disagree with this point for Lee's case, stating that "it is well documented that many jurors are willing to acquit those charged with a first-time, non-violent drug offense, despite evidence of guilt." Pet. App. 5a.

In addition to clarifying the lower courts' treatment of the prejudice prong more broadly, this case

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[16] The Seventh Circuit found prejudice and reversed in *DeBartolo* when presented with a strikingly similar case to Lee's. Similar, except in that DeBartolo was not the first-time drug offender that Lee was (he had a prior cocaine conviction), DeBartolo was charged with possessing and intending to peddle a far greater quantity of drugs (100 marijuana plants), and DeBartolo stole to achieve his ends, unlike Lee. 790 F.3d at 777.

presents the Court with a vehicle to resolve this narrow point as well, and it should do so by acknowledging the simple *rationality* of Lee opting for trial on this ground, under these circumstances.

D. Seeking a Jury's Discretion Is Fundamentally as Rational as Seeking Prosecutorial Discretion

Finally, it is no more irrational for a defendant to seek the discretion of a jury in a case involving strong evidence of guilt than it is to seek prosecutorial discretion in the same circumstance. In this regard, it is notable that the name lawyers use for a jury verdict of acquittal notwithstanding strong evidence of guilt is almost always "jury nullification" and not "jury discretion"; whereas if a defense lawyer persuades a prosecutor to drop charges, we never speak of "prosecutorial nullification." Glenn Harlan Reynolds, Review Essay: Of Dissent and Discretion, 9 Cornell J. L. & Pub. Pol'y 685, 685–86 (2000).

The analogy, though imperfect, is enlightening. Federal prosecutors make innumerable discretionary decisions to charge or not charge as part of their daily work, all of which are unreviewable. This is not unlike juries, which every day decide cases across the nation, without having to set forth their reasons for decision and with the knowledge that if the verdict is acquittal, it is also entirely unreviewable. But the huge perceived gulf between the two types of discretion seems to rely on a depiction of independent jury verdicts—echoed in the *Strickland dicta* discussed above—which contrasts sharply with the ways "nullifying" jurors actually describe their own behavior.

It is not as if jurors need to defend themselves; under the Sixth Amendment the ultimate reasons for their decisions to acquit do not matter from a legal perspective. However, the long-standing and constitutional practice of "nullification" is seldom the phenomena portrayed in writings dismissive of the practice, including caricatures of it as a purely "lawless" behavior. This is not the description that so-called "nullifying" jurors give of their own work when asked. As one study concluded, reviewing juror surveys and data relating to hung juries involving purported "nullification": "[I]t is difficult for jurors themselves—and even more so for judges or lawyers—to separate clearly the evidentiary versus the nullification motives that may underlie jury verdicts." Paula Hannaford-Agor & Valerie Hans, *Nullification at Work? A Glimpse from the National Center for State Courts Study of Hung Juries*, 78 Chi.-Kent L. Rev 1249, 1277 (2003).[17] In other words, many jurors may not be able to tell you how they reached their verdict when they are accused of "nullification"; upon being queried, many may point to evidence admitted in the case, or say they disbelieved government witnesses. Regardless of what they pin their decision on, the reality may be that they are exercising both judgment and

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[17] Nor is this the depiction broadcast from actual video footage recorded by PBS' *Frontline* in a 1986 case. *See* Herbert Mitgang, *Inside the Jury Room*, N.Y. Times (Apr. 8, 1986) https://goo.gl/7DVYqV, (reviewing documentary where permission was granted to record jury deliberations in a case showing a jury rendering an acquittal decision in spite of believing there was evidence of guilt beyond a reasonable doubt, after more than two hours of argument among jurors regarding the scope and intent of the law at issue).

discretion in rendering their ultimate verdict on the whole of the case.

Similarly, the practice of prosecutorial discretion is bestowed upon the independent prosecutor, is essentially unreviewable, and is also not discussed in open court. Reynolds, *supra*, at 685–686 ("At every stage up to the trial, state actors have discretion to drop prosecution, reduce the charges, or approve probation or diversion. That discretion is almost entirely unreviewable. It is also almost entirely without remark or inquiry."). In fact, just as with the independent power of jury decisions, the government routinely moves in federal court to disallow production of evidence or arguments that even touch on the government's charging decisions themselves—essentially barring arguments going to prosecutorial discretion. *E.g.*, *United States v. AU Optronics Corp.*, No. 3:09-CR-0110-SI (N.D. Cal.) (Doc. #489, filed Dec. 6, 2011), United States' Motion in Limine #10 to Preclude Jury Nullification Arguments, at *5 ("The decision by the government to charge or not to charge a person or corporation with a crime is an executive branch decision that lies solely within the discretion of [the DOJ]."; "Issues of prosecutorial discretion . . . are inadmissible.").[18]

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[18] Federal courts routinely grant these motions, cutting off any reference to prosecutorial discretion in argument or evidence. *E.g.*, *United States v. Alvarez-Valdez*, No. CR 13-0431 RB (D.N.M. June 14, 2013) (Memorandum and Order granting United States' "Motion to Exclude Irrelevant Evidence") (holding that "[e]vidence concerning the Prosecution Guidelines of the United States Attorney's Office for the District of New Mexico or the exercise of prosecutorial discretion would not be relevant").

Yet not only would we think of a defendant or his attorney as *rational* if they sought a prosecutor's discretion to drop charges before the charging decision was made, we would think an attorney *unethical* who did not at least attempt to do so—if there was a chance. But when a prosecutor, in spite of seemingly incontrovertible (indeed, "overwhelming") evidence, suddenly declines to prosecute, no one in the judicial system dubs such an exercise of discretion "lawless."[19] Nor do judicial officials state that a person could not have rationally sought after even a seemingly "capricious" decision from a prosecutor.

Indeed, going to the prosecutor before he or she files charges can be the best form of defense lawyering. Failing that form of discretion, in Lee's case, he would like his attorney to be able to seek a *jury's* discretion to acquit him. But in this context, given a case such as Lee's, the Sixth Circuit's rule would errone-

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[19] In a recent case, a newscaster on NBC's "Meet the Press" displayed an unlawful ammunition feeding device on a live broadcast from the District of Columbia, to make a point about gun control laws. When media and an attorney representing NBC sought clarification from the D.C. Attorney General, the Attorney General issued a rare explanation for his decision to decline prosecution in spite of clear evidence of a violation of District gun laws. Letter from Office of the Attorney General for the District of Columbia to Lee Levine (Jan. 11, 2013) http://wapo.st/2jsT3Fq (declining to prosecute NBC host for displaying a "large capacity ammunition feeding device" despite clear violation of D.C. law, in spite of "a history of aggressively prosecuting [such] violations" but where "a prosecution would not promote public safety . . . nor serve the best interests of the people of the District."), http://wapo.st/2jsT3Fq. No one in the judiciary treated NBC's lawyers as irrational for pursuing this exercise of discretion, or treated the decision not to pursue charges as "lawless."

ously close judicial eyes to considering any strategy pinning its hopes on jury discretion or "nullification." That blanket prohibition, however, ignores the paradoxical way in which prosecutorial discretion is treated within the system, regardless of the level of evidence involved. Ignoring both the logic and history of jury discretion, it should be abandoned.

CONCLUSION

Amicus urges the Court to reverse the judgment of the court below and reject its *per se* rule that *Strickland*'s prejudice prong must exclude any consideration that a defendant may try his case with an independent jury strategy—even when rational under the circumstances, as here.

Respectfully submitted,

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No. 16-327

IN THE

Supreme Court of the United States

JAE LEE,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF OF CONSTITUTIONAL ACCOUNTABILITY CENTER AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
INTEREST OF *AMICUS CURIAE*	1
INTRODUCTION AND SUMMARY OF ARGUMENT	1
ARGUMENT	8
I. Under this Court's Precedents, the Question Is Whether the Petitioner Himself Would Have Rejected the Plea Bargain if Not for Counsel's Errors	8
II. Misinterpreting *Padilla*, the Sixth Circuit Changed the Prejudice Inquiry by Asking Whether a "Rational" Person Would Have Rejected the Plea Bargain Instead of Whether the Petitioner Would Have Done So	14
III. The Sixth Circuit's Approach Ignores this Court's Rejection of *Per Se* Rules in the Prejudice Inquiry	19
IV. The Sixth Circuit's Approach Ignores the Severity of Deportation, Long Recognized as a Harsh Penalty Akin to Banishment	23
CONCLUSION	29

TABLE OF AUTHORITIES

Page(s)

Cases

Bridges v. Wixon,
326 U.S. 135 (1945) 26, 27

Calder v. Bull,
3 Dall. 386 (1798) 25

Chaidez v. United States,
133 S. Ct. 1103 (2013) 23

DeBartolo v. United States,
790 F.3d 775 (7th Cir. 2015) 23

Delgadillo v. Carmichael,
332 U.S. 388 (1947) 24

Demore v. Kim,
538 U.S. 510 (2003) 27

Edward Earl of Clarendon's Trial,
6 How. St. Tr. 292 (1667) 24

Fong Yue Ting v. United States,
149 U.S. 698 (1893) 24

Hernandez v. United States,
778 F.3d 1230 (11th Cir. 2015) 23

Hill v. Lockhart,
474 U.S. 52 (1985) ..... *passim*

I.N.S. v. St. Cyr,
533 U.S. 289 (2001) 24

Kennedy v. Mendoza-Martinez,
372 U.S. 144 (1963) 25

TABLE OF AUTHORITIES – cont'd

Page(s)

Kovacs v. United States,
744 F.3d 44 (2d Cir. 2014) 22

Lafler v. Cooper,
132 S. Ct. 1376 (2012) 5, 9, 12

Landon v. Plasencia,
459 U.S. 21 (1982) 27

Lockhart v. Fretwell,
506 U.S. 364 (1993) 20, 21

Missouri v. Frye,
132 S. Ct. 1399 (2012) 9, 13

Moore v. City of E. Cleveland,
431 U.S. 494 (1977) 27

Padilla v. Kentucky,
559 U.S. 356 (2010) ..... *passim*

Peguero v. United States,
526 U.S. 23 (1999) 13, 21

Pilla v. United States,
668 F.3d 368 (6th Cir. 2012) 4, 5, 15

Premo v. Moore,
562 U.S. 115 (2011) 11, 20

Rodriquez v. United States,
395 U.S. 327 (1969) 12, 21

Roe v. Flores-Ortega,
528 U.S. 470 (2000) ..... *passim*

Stanley v. Illinois,
405 U.S. 645 (1972) 27

TABLE OF AUTHORITIES – cont'd

	Page(s)
Stogner v. California, 539 U.S. 607 (2003)	24
Strickland v. Washington, 466 U.S. 668 (1984)	*passim*
United States v. Akinsade, 686 F.3d 248 (4th Cir. 2012)	23
United States v. Cronic, 466 U.S. 648 (1984)	8
United States v. Kayode, 777 F.3d 719 (5th Cir. 2014)	23
United States v. Orocio, 645 F.3d 630 (3d Cir. 2011)	23
United States v. Rodriguez-Vega, 797 F.3d 781 (9th Cir. 2015)	22, 23
Williams v. Taylor, 529 U.S. 362 (2000)	20
Statutes	
21 U.S.C. § 841	2
28 U.S.C. § 2255	4
An Act for Punishment of Rogues, 39 Eliz. 1 (1597)	25
Roman Catholic Relief Act, 10 Geo. 4 (1829)	25

TABLE OF AUTHORITIES – cont'd

Page(s)

Other Materials

Sarah H. Cleveland, *Powers Inherent in Sovereignty: Indians, Aliens, Territories, and the Nineteenth Century Origins of Plenary Power Over Foreign Affairs*, 81 Tex. L. Rev. 1 (2002) 26

William F. Craies, *Compulsion of Subjects to Leave the Realm*, 6 L.Q. Rev. 388 (1890) 24

Kentucky Resolutions of 1798, in 4 *The Debates in the Several State Conventions on the Adoption of the Federal Constitution* (Jonathan Elliot ed.,1836) 26

James Madison, *Report on the Virginia Resolutions, in* 4 *The Debates in the Several State Conventions on the Adoption of the Federal Constitution* (Jonathan Elliot ed., 1836) 26

INTEREST OF *AMICUS CURIAE*[1]

Constitutional Accountability Center (CAC) is a think tank, public interest law firm, and action center dedicated to fulfilling the progressive promise of our Constitution's text and history. CAC works in our courts, through our government, and with legal scholars to improve understanding of the Constitution and to preserve the rights and freedoms it guarantees. CAC works to defend constitutional protections for non-citizen immigrants as well as for citizens, and it has a strong interest in ensuring that the Constitution applies as robustly as its text and history require. Accordingly, CAC has an interest in this case.

INTRODUCTION AND SUMMARY OF ARGUMENT

The Sixth Amendment guarantees that every person charged with a crime is entitled to the effective assistance of counsel. When that right is denied, a conviction or sentence that results from the denial must be vacated. The court below has subverted these long-established standards. Instead of examining whether the petitioner here, Jae Lee, would have rejected a harmful plea bargain if not for his attorney's mistakes—as precedent requires—the court denied relief based on a categorical rule about when it is "rational" for clients to reject plea bargains. In the court's words,

---

[1] The parties have consented to the filing of this brief and their letters of consent have been filed with the Clerk. Under Rule 37.6 of the Rules of this Court, *amicus* state that no counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus* or its counsel made a monetary contribution to its preparation or submission.

"no rational defendant charged with a deportable offense and facing overwhelming evidence of guilt would proceed to trial rather than take a plea deal with a shorter prison sentence." Pet. App. 4a (quotation marks omitted).

In other words, according to the court below, *every* noncitizen defendant facing slim prospects at trial would take a plea deal that shortens his sentence but dashes all hope of remaining in this country—no matter how strong his personal, familial, or financial ties to the United States, and no matter how clear it is that maintaining those ties was his primary goal during plea negotiations. This *per se* rule conflicts with this Court's precedents, defies reason, and leads to profound injustices in cases like this one. This Court should reject it and reverse the decision below.

Jae Lee is a lawful permanent resident of this country who was brought here by his parents thirty-five years ago when he was just thirteen. He was educated here and has never returned to his birth country of Korea. He owns two restaurants in Memphis, Tennessee, where he lived for twenty years before his incarceration. His elderly parents, now U.S. citizens, live in New York, and Lee is the only child left to take care of them. Pet. App. 54a.

In 2009, law enforcement officers searched Lee's home pursuant to a federal warrant, based on an informant's tip. They found 88 ecstasy pills, and Lee was charged with possession with intent to distribute a controlled substance, in violation of 21 U.S.C. § 841(a)(1). *Id.* at 53a. Lee had never previously been convicted of a crime. Pet'r Br. 6. After he pleaded not guilty in his initial court appearance, Lee and his newly retained attorney began plea negotiations with the government. Lee's attorney, Larry Fitzgerald, later testified that he viewed Lee's case as "a bad case

to try," because, among other things, he could find no basis for suppressing the results of the search, and the circumstances made it difficult to argue that the drugs were only for personal use. *Id.* at 54a. Fitzgerald testified that it would have been "difficult, let's put it that way, not impossible but it would [have been] difficult" to succeed at trial. *Id.* at 45a.

Fitzgerald also testified that "Lee repeatedly raised the question of deportation and indicated that it was his main concern in deciding how to proceed." *Id.* at 54a. After a proffer session with the government, "Fitzgerald discussed with Lee the risk of going to trial versus the benefits of pleading guilty," advising Lee that "he would likely face between three and five years of imprisonment if he went to trial and were convicted whereas if he accepted the plea agreement he would be looking at a much shorter term of imprisonment or possibly even just probation." *Id.* at 55a. Fitzgerald told Lee that "the government" was not seeking to deport him as part of the proposed plea agreement, *id.*, and, according to Lee, also said: "'[Y]ou have been in the United States so long they cannot deport you. Even if they want to deport you, it's not in the plea agreement,'" *id.* at 56a (quoting hearing transcript). Fitzgerald testified that "Lee believed he would not be deported if he pled guilty" and that this was "'the key to [Lee's] decision'" to accept the plea deal. *Id.* (quoting hearing transcript) (alteration in original).

Upon accepting the deal and pleading guilty, Lee was sentenced to a term of one year and a day. Only after beginning his incarceration did he learn that Fitzgerald's advice was wrong: conviction on the charge to which he pleaded guilty requires automatic deportation, and removal proceedings against him were imminent. *Id.* at 54a, 58a. Lee then filed a mo-

tion to vacate his sentence under 28 U.S.C. § 2255, arguing that he was deprived of his Sixth Amendment right to the effective assistance of counsel. *Id.* at 18a-20a.

Despite an evidentiary hearing before a magistrate judge during which "[t]he testimonies of Lee and Fitzgerald were consistent that deportation was the determinative issue in Lee's decision whether to accept the plea deal," *id.* at 56a, and despite the magistrate's recommendation that Lee's motion be granted because "it would have been rational for him to choose to go to trial" if he had known that his plea deal would result in mandatory, automatic deportation, *id.* at 76a; *see id.* ("under the circumstances, deportation was, objectively, at least as undesirable as any prison sentence"), both the district court and the Sixth Circuit concluded that Lee was not prejudiced by his counsel's assurances that he would not be deported if he pleaded guilty. Even though the district court adopted the magistrate judge's factual findings, and even though the Sixth Circuit acknowledged "[a]s a factual matter" that "many defendants in [Lee's] position, had they received accurate advice from counsel, would have decided to risk a longer prison sentence in order to take their chances at trial, slim though they were," *id.* at 4a, both courts concluded that such a finding was insufficient.

Rather, as the Sixth Circuit explained, it could grant relief to Lee only by reaching the additional conclusion that rejecting the plea bargain would have been "'rational under the circumstances.'" Pet. App. 3a (quoting *Pilla v. United States*, 668 F.3d 368, 373 (6th Cir. 2012)); *see id.* at 46a (district court concluding that "[t]he proper focus under an objective standard is on whether *a reasonable defendant* in Lee's situation would have accepted the plea offer and changed his

plea to guilty" (emphasis added)). On this additional question the panel viewed itself as bound by circuit precedent, which had established a *per se* rule for situations like Lee's: "no rational defendant charged with a deportable offense and facing 'overwhelming evidence' of guilt would proceed to trial rather than take a plea deal with a shorter prison sentence." *Id.* at 4a (quoting *Pilla*, 668 F.3d at 373). As the panel concluded, "Lee finds himself in precisely this position, and he must therefore lose." *Id.*

The Sixth Circuit has strayed from this Court's holdings, and its decision here should be reversed. Under *Strickland v. Washington*, 466 U.S. 668 (1984), defendants who show prejudice from their counsel's errors are entitled to relief. In the context of plea bargains, the touchstone of the prejudice inquiry is whether "the outcome of the plea process would have been different with competent advice." *Lafler v. Cooper*, 132 S. Ct. 1376, 1384 (2012); *Hill v. Lockhart*, 474 U.S. 52, 59 (1985). The answer to that question "will turn on the facts of the particular case." *Roe v. Flores-Ortega*, 528 U.S. 470, 485 (2000). A court must therefore consider, among other things, the goals and priorities that motivated a particular defendant during plea negotiations—whether, for instance, "he placed particular emphasis on" any special factor, like deportation, "in deciding whether or not to plead guilty." *Hill*, 474 U.S. at 60.

Gauging whether a defendant would have gone to trial but for counsel's errors often requires assessing the likelihood that he would have prevailed at trial, because this can be expected to have influenced his decision. But the likelihood of victory at trial is not significant in its own right, much less dispositive of the prejudice inquiry—its relevance lies in how it might have affected the defendant's choice. *See Hill*, 474 U.S.

at 59-60; *cf. Flores-Ortega*, 528 U.S. at 486. Thus, other relevant factors bearing on that choice must also be taken into account.

At no time is this more important than when a defendant faced collateral consequences for a conviction that required balancing the risk of a longer sentence with a desire to avoid those consequences. In this case, for instance, Lee had to balance the risk that proceeding to trial and losing would increase his prison sentence by a few years with the fact that accepting the plea bargain meant eliminating virtually any chance of remaining in this country. The choice of how to balance those competing demands will be a personal one, resting on factors that include a defendant's ties to the United States, his connections (or lack thereof) to his birth country, the length of his potential sentence if convicted at trial, his prospects at trial, and his own temperamental willingness to accept high risk in exchange for high reward. Only by taking into account the various circumstances that confronted a particular defendant can a court determine whether, "but for counsel's errors, [the defendant] would not have pleaded guilty and would have insisted on going to trial." *Hill*, 474 U.S. at 59.

Alone among the courts of appeals, the Sixth Circuit has adopted a categorical rule that frustrates the application of these standards. According to the Sixth Circuit, a single sentence of *Padilla v. Kentucky*, 559 U.S. 356 (2010), a decision that did not involve the prejudice inquiry, somehow imposed a new burden on defendants who challenge their guilty pleas. Thus, in the Sixth Circuit's view, a defendant must do more than show a reasonable probability that he would have rejected his plea bargain with competent advice. He also must also show that a "rational" person would have done the same thing. Pet. App. 4a. But *Padilla*

imposed no such burden. The statement on which the Sixth Circuit has placed so much weight—a passing reference made in the context of a discussion focused on other matters—is a shorthand summary of existing doctrine, not an attempt to establish new doctrine. *Padilla* does not, as the Sixth Circuit would have it, instruct lower courts to eschew the question of whether a specific defendant would have rejected his plea deal, in favor of an abstract inquiry into whether that choice would have been "rational."

Moreover, by shifting the focus of the prejudice inquiry toward how a "rational" person would have acted, the Sixth Circuit inevitably relies on broad, categorical rules to decide what choices rational persons would make. Thus, the Circuit has decreed that *every* defendant facing "overwhelming evidence" of guilt would take a plea deal, even though doing so eliminates any chance of remaining in this country. *Id.* Such *per se* rules, this Court has insisted, are inimical to the prejudice analysis under *Strickland*, which requires considering all of the circumstances in each individual case.

Finally, the categorical rule adopted by the Sixth Circuit fails to reckon with the drastic nature of deportation. In declaring that no defendant facing slim prospects at trial would decide that a small chance of remaining in the United States is worth the risk of more time in prison, the Circuit ignores what this Court has emphasized time and again—few penalties are more "drastic" and "severe" than deportation, "the equivalent of banishment or exile." *Padilla*, 559 U.S. at 360, 365, 373. The severity of banishment from one's adopted homeland makes it entirely predictable that some defendants would seek to avoid it at all costs, and thus they would, like Lee, risk a longer jail sentence for even a glimmer of hope to remain in this country.

ARGUMENT

I. Under this Court's Precedents, the Question Is Whether the Petitioner Himself Would Have Rejected the Plea Bargain if Not for Counsel's Errors.

The Sixth Amendment's guarantee of counsel is meant to "ensure that a defendant has the assistance necessary to justify reliance on the outcome of the proceeding." *Strickland*, 466 U.S. at 691-92. An attorney's deficient performance prejudices the defendant—justifying relief from a conviction or sentence—when "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694.

As this Court has recognized, "[t]he governing legal standard plays a critical role in defining the question to be asked in assessing the prejudice from counsel's errors." *Id.* at 695. Thus, courts reviewing a claim of ineffective assistance "do not view counsel's performance in the abstract." *United States v. Cronic*, 466 U.S. 648, 658 n.22 (1984). Instead, they attempt to gauge the "impact" of any deficiency on the proceeding that took place. *Id.* A defendant's burden is to "show how specific errors of counsel undermined the reliability" of the proceeding. *Id.* at 659 n.26.

Some attorney errors, however, lead "not to a judicial proceeding of disputed reliability, but rather to the forfeiture of a proceeding itself," such as a jury trial or an appeal. *Flores-Ortega*, 528 U.S. at 483. Where this is the allegation, a defendant must demonstrate that but for counsel's errors he would have availed himself of the proceeding in question—in other words, that it was counsel's deficiency, not some other factor, that "caused the defendant to forfeit a judicial proceeding

to which he was otherwise entitled." *Flores-Ortega*, 528 U.S. at 485.

If an attorney neglects to file an appeal or consult with his client about it, for example, the client must show that "but for counsel's deficient failure to consult with him about an appeal, he would have timely appealed." *Id.* at 484. Similarly, when an attorney fails to relay a plea offer to his client, who subsequently pleads guilty on less favorable terms, the client must show that, if properly informed, he "would have accepted the offer to plead pursuant to the terms earlier proposed." *Missouri v. Frye*, 132 S. Ct. 1399, 1410 (2012); *see Lafler*, 132 S. Ct. at 1385. Finally, the same is true when a defendant accepts a plea bargain after receiving incorrect advice about its consequences; in that case, he must show that "but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial." *Hill*, 474 U.S. at 59; *Padilla*, 559 U.S. at 359 (defendant must show that he "would have insisted on going to trial if he had not received incorrect advice from his attorney").

What sets these cases apart from those in which a court proceeding took place is that the key decision alleged to have been compromised by counsel's errors "rested with the defendant," *Flores-Ortega*, 528 U.S. at 485, not with a judge or jury. Thus, whether the defendant was prejudiced by counsel's errors hinges on the choice that *the defendant* would have made if he had received constitutionally adequate assistance.

This principle has been clear since *Hill v. Lockhart*, which established the framework for claims that ineffective assistance resulted in an unfavorable plea bargain. In such cases, the Court explained, the focus of the prejudice inquiry is on what the defendant himself would have done if properly assisted—whether, "but for counsel's errors, he would not have pleaded

guilty and would have insisted on going to trial." *Hill*, 474 U.S. at 59.

The inquiry thus requires examining a number of factors to discern the goals and priorities that might have motivated the defendant during plea negotiations—whether, for instance, "he placed particular emphasis on" any special considerations "in deciding whether or not to plead guilty." *Id.* at 60. Only by considering all the surrounding factors and inferences fairly drawn from those factors can a court decide what that particular defendant would have done, and thus, whether "the result of the proceeding would have been different." *Strickland*, 466 U.S. at 694.[2]

In gauging whether a defendant would have gone to trial but for counsel's errors, courts generally will need to assess the likelihood that he would have prevailed at trial, because this can be expected to have influenced his decision. When, for instance, "in connection with a guilty plea, counsel gives deficient advice

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[2] To illustrate, the defendant in *Hill* failed to make the necessary showing because he offered no reason to believe that he actually would have made a different choice had he received proper advice from counsel. Although the basis of his claim was that counsel failed to advise him about when he would be eligible for parole, he did not assert that "had counsel correctly informed him about his parole eligibility date, he would have pleaded not guilty and insisted on going to trial." *Id.* at 60. Nor did he cite any "special circumstances that might support the conclusion that he placed particular emphasis on his parole eligibility in deciding whether or not to plead guilty." *Id.* And it was difficult to imagine how counsel's mistake possibly *could* have swayed him to reject the plea, because the mistake "would seem to have affected not only his calculation of the time he likely would serve if sentenced pursuant to the proposed plea agreement, but also his calculation of the time he likely would serve if he went to trial and were convicted." *Id.*

regarding a potentially valid affirmative defense, the prejudice inquiry depends largely on whether that affirmative defense might have succeeded, leading a rational defendant to insist on going to trial." *Flores-Ortega*, 528 U.S. at 486 (citing *Hill*, 474 U.S. at 59).

Importantly, however, the likelihood of victory at trial is relevant only because of how it might have affected the defendant's choices. *See id.*; *Hill*, 474 U.S. at 59 ("[W]hether the error 'prejudiced' the defendant by causing him to plead guilty rather than go to trial will depend on the likelihood that discovery of the evidence would have led counsel to change his recommendation as to the plea. *This assessment, in turn, will depend in large part* on a prediction whether the evidence likely would have changed the outcome of a trial." (emphasis added)); *see, e.g.*, *id.* at 60 (rejecting contention that accurate information about parole eligibility would have prompted defendant to decline the plea bargain, because that information "would seem to have affected [equally] his calculation of the time he likely would serve if he went to trial and were convicted"); *Premo v. Moore*, 562 U.S. 115, 129 (2011) (agreeing that defendant might have accepted the plea bargain even if counsel succeeded in excluding his confession, because "the State's case was already formidable" and "might well have become stronger" with further investigation, while the plea bargain "allowed him to avoid a possible sentence of life without parole or death").

That courts will often need to consider whether a choice would have been "rational" should not obscure a fundamental point: the ultimate, dispositive question is what the defendant before the court would have done, and considering the rationality of various choices simply helps answer that question. It is not part of a separate inquiry. This is made clear by *Hill*, which

recognizes that during plea negotiations some defendants might place "particular emphasis" on a factor not prioritized by other defendants, making it rational for the choices of the former to differ from those of the latter. *Hill*, 474 U.S. at 60. In short, because the prejudice inquiry requires assessing the likely outcome of a counterfactual reality, courts will often need to consider how a defendant's prospects at trial, along with other factors, would likely have influenced his choices—enabling a decision about whether "the outcome of the plea process would have been different with competent advice." *Lafler*, 132 S. Ct. at 1384.

This Court applies the same standards when counsel's deficiency allegedly caused a defendant to forfeit an appeal. Here, too, whether a defendant was prejudiced by the deficiency hinges on what he himself would have chosen to do if he had received competent aid. "If the defendant cannot demonstrate that, but for counsel's deficient performance, he would have appealed, counsel's deficient performance has not deprived him of anything, and he is not entitled to relief." *Flores-Ortega*, 528 U.S. at 484. But if the defendant can show that he actually would have appealed but for counsel's mistakes, he can prevail. In *Rodriquez v. United States*, 395 U.S. 327 (1969), for instance, where counsel disregarded a defendant's instruction to appeal his conviction, the defendant's request "objectively indicated his intent to appeal," demonstrating prejudice and entitling him to relief. *Flores-Ortega*, 528 U.S. at 485. In other situations, where contemporaneous evidence indicating a defendant's intentions cannot be found, the defendant may rely instead on reasons that appealing the conviction would have been the logical thing for him to do. *See id.* ("evidence that there were nonfrivolous grounds for appeal *or* that the defendant in question promptly expressed a desire to

appeal will often be highly relevant in making [the prejudice] determination" (emphasis added)).

Likewise, where counsel withholds a plea bargain offer from a defendant who later pleads guilty on less favorable terms, prejudice can be demonstrated if the defendant offers persuasive reasons to believe that he would have accepted the earlier plea offer if properly informed. *See, e.g.*, *Frye*, 132 S. Ct. at 1411 ("Frye's acceptance of the less favorable plea offer indicated that he would have accepted the earlier (and more favorable) offer had he been apprised of it."). The same standards apply in other contexts where vacating a conviction or sentence requires demonstrating prejudice from an error. Thus, if a district court fails to advise a defendant at sentencing of his right to appeal—as required by the Federal Rules of Criminal Procedure—the mere fact of the error does not entitle him to relief "if he knew of his right and hence suffered no prejudice from the omission." *Peguero v. United States*, 526 U.S. 23, 24 (1999). The knowledge held by the specific defendant before the court is significant because what ultimately matters is what *he* would have done absent the error. *See id.* at 25 (denying relief based on finding that "petitioner knew of his right to appeal when the sentencing hearing occurred").

In sum, when counsel's deficient performance allegedly affected a decision that "rested with the defendant" rather than with a judge or jury, *Flores-Ortega*, 528 U.S. at 485, the prejudice inquiry must ask what *that defendant* would have done if he had received constitutionally adequate assistance. There is no requirement to show that a hypothetical "rational" defendant—who might not place "particular emphasis" on the same factors, *Hill*, 474 U.S. at 60—would have made the same choice.

II. Misinterpreting *Padilla*, the Sixth Circuit Changed the Prejudice Inquiry by Asking Whether a "Rational" Person Would Have Rejected the Plea Bargain Instead of Whether the Petitioner Would Have Done So.

Padilla changed none of the standards set forth above. The Sixth Circuit, however, has misinterpreted one sentence in that opinion—a brief summary of existing doctrine—as imposing a new burden on defendants who challenge their guilty pleas. According to the Circuit, a defendant must do more than show a reasonable probability that he would have rejected his plea bargain with competent advice. He also must show that a "rational" person would have done the same thing. *Padilla* imposed no such burden.

To start, it bears emphasis that *Padilla*'s holding addressed only the performance prong of the *Strickland* test. It did not involve the prejudice prong, as the Court noted three times. *See Padilla*, 559 U.S. at 360 ("Whether [Padilla] is entitled to relief depends on whether he has been prejudiced, a matter that we do not address."); *id.* at 369 (same); *id.* at 374 (same).

The Court's opinion did, however, briefly refer to the prejudice prong while discussing the likely effects of its holding. Acknowledging concerns about "protecting the finality of convictions obtained through guilty pleas," the Court sought to assuage fears that its holding would lead to a wholesale unraveling of such pleas. It first noted that a similar "floodgates" concern was raised in *Hill* but "[a] flood did not follow in that decision's wake." *Id.* at 371. "Surmounting *Strickland*'s high bar is never an easy task," *id.*, the Court observed, before continuing as follows:

> Moreover, to obtain relief on this type of claim, a petitioner must convince the court that a decision to reject the plea bargain would have been rational under the circumstances. See *Roe* v. *Flores-Ortega*, 528 U.S. 470, 480, 486 (2000). There is no reason to doubt that lower courts—now quite experienced with applying *Strickland*—can effectively and efficiently use its framework to separate specious claims from those with substantial merit.

Id. at 372. The Court then cited two more reasons it was "unlikely that our decision today will have a significant effect on those convictions already obtained as the result of plea bargains." *Id.*

Misinterpreting the import of this discussion, the Sixth Circuit has seized on this Court's passing reference to *Strickland* prejudice and made that statement the basis of a new rule: "The test is objective, not subjective; and thus, 'to obtain relief on this type of claim, a petitioner must convince the court that a decision to reject the plea bargain would have been rational under the circumstances.'" *Pilla*, 668 F.3d at 373 (quoting *Padilla*, 559 U.S. at 372); *see* Pet. App. 3a (same). But the context in which this Court made that statement leaves no doubt that it was intended to summarize existing standards, not establish a new one. Indeed, the citations the Court provided to support this statement made clear that it was simply a shorthand description of a more complex doctrine—as one would expect from a passing reference found in the midst of a discussion focused on other concerns. There is no basis, therefore, to strip this sentence from its context, ignore the passages it was meant to summarize, and elevate the isolated text into a harsh new standard that is at odds with this Court's holdings.

Yet that is precisely what the Sixth Circuit has done. And it denied relief to Lee based on his perceived inability to satisfy this new test. The court acknowledged that "[a]s a factual matter, . . . many defendants in [Lee's] position, had they received accurate advice from counsel, would have decided to risk a longer prison sentence in order to take their chances at trial, slim though they were." Pet. App. 4a. But the court never decided whether it was reasonably probable that Lee himself would have taken this risk. Resolving that question was unnecessary, in the court's view, because Lee could not meet his additional burden of showing that going to trial under these circumstances would have been "rational." *Id.*

In declaring the prejudice test to be "objective," the Sixth Circuit has not simply made the point that successful defendants must offer more than their own word about what they would have done if advised differently by counsel. Instead, the Circuit has declared that what matters is not the choice that the defendant himself would have made—based on his own personal priorities, tolerance for risk, and subjective weighing of the various factors at play—but rather the choice that a hypothetical "rational" person would have made in the same circumstances. That is why the court dispensed with assessing whether Lee himself, "[a]s a factual matter," would have decided to reject the plea bargain if competently advised, and instead moved on to what it saw as the real question: "would such a decision be 'rational'?" *Id.*

Before *Padilla*, this Court had never used the formulation on which Sixth Circuit based its new test. The sentence in *Padilla* on which the Circuit relied cited two passages from *Flores-Ortega*, and those passages both run counter to the new rule that the Circuit has devised.

In the first of those cited passages, this Court discussed the *performance* prong of *Strickland*—specifically, the question of when attorneys are obligated to consult with their clients regarding an appeal: "counsel has a constitutionally imposed duty to consult with the defendant about an appeal when there is reason to think either (1) that a rational defendant would want to appeal (for example, because there are nonfrivolous grounds for appeal), or (2) that this particular defendant reasonably demonstrated to counsel that he was interested in appealing." *Flores-Ortega*, 528 U.S. at 480. This framework bears some similarity to the prejudice analysis, because the attorney (and a court later reviewing the attorney's performance) must gauge the defendant's interest in appealing. And just as in the prejudice analysis, the defendant's interest can be shown either by direct, contemporaneous evidence of what he actually wanted to do, "or" by inferences regarding what a rational defendant in his situation would want to do. There is no requirement that *both* criteria be satisfied: "Only by considering all relevant factors in a given case can a court properly determine whether a rational defendant would have desired an appeal *or* that the particular defendant sufficiently demonstrated to counsel an interest in an appeal." *Id.* (emphasis added).

The second passage, which simply recapitulates a point made in *Hill*, is consistent: "when, in connection with a guilty plea, counsel gives deficient advice regarding a potentially valid affirmative defense, the prejudice inquiry depends largely on whether that affirmative defense might have succeeded, leading a rational defendant to insist on going to trial." *Id.* at 486 (citing *Hill*, 474 U.S. at 59). This passage indicates that while the prejudice inquiry "depends largely" on the defendant's likely prospects at the proceeding he

forfeited, it does so only because of how those prospects would have affected his choice. The prejudice inquiry thus does not depend *entirely* on those prospects. *See id.* at 485 ("The question whether a defendant has made the requisite showing will turn on the facts of the particular case. Nonetheless, evidence that there were nonfrivolous grounds for appeal *or that the defendant in question promptly expressed a desire to appeal* will often be highly relevant in making this determination" (emphasis added)).

In sum, the very passages on which *Padilla* relied in its brief reference to the prejudice standard belie the Sixth Circuit's interpretation—that this Court meant to establish a distinction between what the defendant would have done and what a hypothetical "rational" person would have done in the same situation.

To be clear, a defendant must show that his choice would have been "rational" in the following sense: his claim that he would have acted differently if competently advised must be credible, enough so to establish a reasonable probability of a different result. In *Hill*, for instance, the defendant failed this test because the mistake of counsel he complained of "would seem to have affected not only his calculation of the time he likely would serve if sentenced pursuant to the proposed plea agreement, but also his calculation of the time he likely would serve if he went to trial and were convicted." *Hill*, 474 U.S. at 60. This is the type of "specious claim[]" that the prejudice inquiry, properly applied, separates from those "with substantial merit." *Padilla*, 559 U.S. at 372.

But when a defendant faces collateral consequences for a conviction, such as deportation, he must balance considerations that directly compete with one another—such as the risk of a longer prison sentence versus the chance to remain in the United States. The

choice of how to balance those competing demands will be a personal one, resting on factors that include a defendant's ties to the United States, his connections (or lack thereof) to his birth country, the length of his potential sentence if convicted at trial, his prospects at trial, and his own temperamental willingness to accept high risk in exchange for high reward. Neither *Padilla* nor any other decision of this Court calls for judges to impose a one-size-fits-all rule, based on a single factor, that dictates what would be "rational" for every defendant.

III. The Sixth Circuit's Approach Ignores this Court's Rejection of *Per Se* Rules in the Prejudice Inquiry.

Because the Sixth Circuit has shifted the focus of the prejudice inquiry away from the defendant before the court, toward consideration of how a "rational" person would have acted, the Circuit inevitably must rely on broad, *per se* rules to decide what choices rational persons would make. Thus, instead of deciding whether Lee would have rejected his plea bargain, the Circuit rejected his claim based on its categorical rule that "no rational defendant charged with a deportable offense and facing 'overwhelming evidence' of guilt would proceed to trial rather than take a plea deal with a shorter prison sentence." Pet. App. 4a. Such *per se* rules, however, are inimical to the prejudice analysis under *Strickland*, which requires considering all of the circumstances in each individual case.

As this Court has stressed, the *Strickland* analysis is not meant to "establish mechanical rules" but rather to "guide the process" of deciding whether "the result *of the particular proceeding* is unreliable because of a breakdown in the adversarial process that our system counts on to produce just results." *Strickland*, 466

U.S. at 696 (emphasis added). Thus, in "all applications" of *Strickland*'s prejudice test, "the question whether a given defendant has made the requisite showing will turn on the facts of a particular case." *Flores-Ortega*, 528 U.S. at 485; *see Williams v. Taylor*, 529 U.S. 362, 391 (2000) ("the *Strickland* test of necessity requires a case-by-case examination of the evidence" (quotation marks omitted)); *Lockhart v. Fretwell*, 506 U.S. 364, 369 n.2 (1993) (referencing "the case-by-case prejudice inquiry that has always been built into the *Strickland* test").

The prejudice inquiry is therefore not susceptible to *per se* rules or to sweeping, categorical approaches. To the contrary, this Court has always emphasized that courts "must consider the totality of the evidence" in making the prejudice determination. *Strickland*, 466 U.S. at 695. So firmly entrenched is this principle that failure to heed it renders a court's decision an unreasonable application of clearly established federal law. *See Williams*, 529 U.S. at 397 ("the State Supreme Court's prejudice determination was unreasonable insofar as it failed to evaluate the totality of the available mitigation evidence").

Given the importance of considering all the circumstances of a particular case when evaluating prejudice, this Court has not hesitated to rebuff lower courts when they attempt to establish categorical shortcuts.[3] In *Premo*, for instance, this Court observed that the lower court appeared to have accepted "a *per se* rule of prejudice, or something close to it, in all cases involving suppressible confessions." *Premo*, 562

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[3] In special situations, prejudice from a denial of effective assistance is presumed, meaning that courts do not conduct a prejudice inquiry. *See Williams*, 529 U.S. at 391.

U.S. at 130. Disclaiming any such rule, the Court reiterated the need for a case-by-case inquiry into "whether [the defendant] established the reasonable probability that he would not have entered his plea but for his counsel's deficiency." *Id.* (citing *Hill*, 474 U.S. at 59). Similarly, in *Flores-Ortega* this Court explained: "The Court of Appeals below applied a *per se* prejudice rule, and granted habeas relief based solely upon a showing that counsel had performed deficiently under its standard. Unfortunately, this *per se* prejudice rule ignores the critical requirement that counsel's deficient performance must actually cause the forfeiture of the defendant's appeal." *Flores-Ortega*, 528 U.S. at 484 (citation omitted). And in *Peguero*, this Court clarified that the "limited and fact-specific conclusion" of one of its earlier opinions "does not support *a general rule* that a court's failure to advise a defendant of the right to appeal automatically requires resentencing to allow an appeal." *Peguero*, 526 U.S. at 28-29 (1999) (emphasis added) (citing *Rodriquez*, 395 U.S. at 329-30).

Each time, this Court rejected categorical approaches that obviated the need for a "case-by-case" inquiry, *Fretwell*, 506 U.S. at 369 n.2, into whether "the result of the proceeding would have been different" but for counsel's errors. *Strickland*, 466 U.S. at 694-95.

The rule adopted by the Sixth Circuit represents just such a categorical approach—discounting evidence that Lee himself placed a premium on remaining in the United States and prioritized this concern during plea negotiations over "any potential jail sentence." *Padilla*, 559 U.S. at 368. More generally, the Sixth Circuit's rule leaves no room to consider the nature and strength of a defendant's ties to the United States and unfamiliarity with his birth country. Although the Sixth Circuit purports to recognize that "a

claimant's ties to the United States should be taken into account," Pet. App. 10a, it made Lee's slim prospects at trial wholly determinative of the prejudice inquiry. The Circuit thus transformed a single, albeit important, factor that must be considered as part of the prejudice inquiry into the *only* factor considered. As a result, no matter how deep a defendant's ties to the United States, or how clear it is that maintaining those ties was his primary goal in plea negotiations, the Circuit applies the same unyielding rule: *every* defendant facing strong evidence of guilt would take a plea deal instead of risking a longer sentence by going to trial.

That rigid doctrine simply defies reality in a case like this one. Consulting with his lawyer during plea negotiations, "Lee repeatedly raised the question of deportation and indicated that it was his main concern in deciding how to proceed." *Id.* at 54a. His lawyer has testified that "deportation was the determinative issue in Lee's decision whether to accept the plea deal," *id.* at 56a, and this testimony is entirely credible given Lee's long life in the United States, his strong familial ties here, and his lack of any connection whatsoever to Korea, *id.* at 75a. One could scarcely find a better case to illustrate the folly of the Sixth Circuit's *per se* rule.

No other circuit has made this mistake. Other courts give due weight to evidence that a defendant was particularly motivated by immigration consequences during plea negotiations. *See, e.g.*, *Kovacs v. United States*, 744 F.3d 44, 53 (2d Cir. 2014) (relying on evidence that defendant's "single-minded focus in the plea negotiations was the risk of immigration consequences"); *United States v. Rodriguez-Vega*, 797 F.3d 781, 789 (9th Cir. 2015) (relying on evidence that defendant sought "to limit her chances of removal"). These courts also take into account the full range of

circumstances that can be expected to have influenced a petitioner's choices during plea negotiations, including not only the prospects of victory at trial, but also the petitioner's length of time in the United States, family ties here, age, familiarity (or lack thereof) with his birth country, length of potential sentence if convicted at trial, chances of negotiating a plea that would avoid deportation, and any judicial admonishment received at sentencing regarding immigration consequences. *See DeBartolo v. United States*, 790 F.3d 775, 778-80 (7th Cir. 2015); *Hernandez v. United States*, 778 F.3d 1230, 1234 (11th Cir. 2015); *Rodriguez-Vega*, 797 F.3d at 788-90; *United States v. Kayode*, 777 F.3d 719, 725-29 (5th Cir. 2014); *Kovacs*, 744 F.3d at 51-53; *United States v. Akinsade*, 686 F.3d 248, 255-56 (4th Cir. 2012); *United States v. Orocio*, 645 F.3d 630, 643-45 (3d Cir. 2011), *abrogated on other grounds by Chaidez v. United States*, 133 S. Ct. 1103 (2013).

While these courts acknowledge *Padilla*'s statement that defendants must show that rejecting the plea bargain would have been rational under the circumstances, they all interpret and apply that statement in a manner consistent with this Court's holdings. Only the Sixth Circuit has transformed it into a *per se* rule that sidesteps the true question—whether "the result of the particular proceeding" is unreliable because of a breakdown in the adversarial process. *Strickland*, 466 U.S. at 696.

IV. The Sixth Circuit's Approach Ignores the Severity of Deportation, Long Recognized as a Harsh Penalty Akin to Banishment.

The rule adopted by the Sixth Circuit has yet another fatal flaw: it fails to adequately account for the drastic nature of deportation. Under the Sixth Circuit's rule, no defendant facing slim prospects at trial would decide that a small chance of remaining in the

United States is worth the risk of more time in prison. But that broad pronouncement simply ignores what this Court has emphasized time and again—few penalties are more extreme than permanent banishment from one's adopted homeland. The severity of this penalty makes it entirely understandable that some defendants would try to avoid it at all costs and thus, like Lee, would risk a longer jail sentence for even a glimmer of hope of remaining in this country.

As this Court has long recognized, "deportation is a particularly severe penalty," *Padilla*, 559 U.S. at 365 (citing *Fong Yue Ting v. United States*, 149 U.S. 698, 740 (1893) (quotation marks omitted)), a "drastic measure" that is "'the equivalent of banishment or exile,'" *id.* at 373 (quoting *Delgadillo v. Carmichael*, 332 U.S. 388, 390-91 (1947)). For many defendants, therefore, preserving the right to remain in the United States "may be more important . . . than any potential jail sentence." *Id.* at 368 (quoting *I.N.S. v. St. Cyr*, 533 U.S. 289, 322 (2001)); *cf.* Pet. App. 54a, 56a (testimony indicating that this was true for Lee).

Indeed, banishment has been recognized throughout history as a harsh and drastic fate. *See generally Stogner v. California*, 539 U.S. 607, 643 (2003) (Kennedy, J., dissenting) (explaining that historically banishment was considered to be punishment for severe offenses and was "'the highest punishment next to death'" (quoting *Edward Earl of Clarendon's Trial*, 6 How. St. Tr. 292, 386 (1667))). Banishment has been acknowledged as a particularly harsh penalty for centuries, and was recognized as such both at the time of our nation's Founding and at its Reconstruction. *See Stogner*, 539 U.S. at 642, 644-45 (Kennedy, J., dissenting); *see also id.* at 644-45 (quoting William F. Craies, *Compulsion of Subjects to Leave the Realm*, 6 L.Q. Rev. 388, 392 (1890)

("[B]anishment, perpetual or temporary, was well known to the common law")); An Act for Punishment of Rogues, 39 Eliz. 1, c. 4, s. 4 (1597); Roman Catholic Relief Act, 10 Geo. 4, c. 7, s. 28 (1829) (providing for the banishment of Jesuits). In 1798, this Court in *Calder v. Bull* cited the banishments of Lord Clarendon in 1667 and Bishop Francis Atterbury in 1723 as examples of improper, increased punishments exacted by British parliamentary enactments. 3 Dall. 386, 389 (1798); *see Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 168 n.23 (1963) ("[F]orfeiture of citizenship and the related devices of banishment and exile have throughout history been used as a punishment. . . . Banishment was a weapon in the English arsenal for centuries, but it was always adjudged a harsh punishment even by men accustomed to brutality in the administration of criminal justice." (citations and quotation marks omitted)).

Recognizing that removal of a resident alien can be as severe a punishment as criminal banishment, James Madison argued in opposition to the Alien and Sedition Acts:

> If the banishment of an alien from a country into which he has been invited as the asylum most auspicious to his happiness, a country where he may have formed the most tender connections; where he may have invested his entire property, and acquired property of the real and permanent, as well as the moveable and temporary, kind; where he enjoys, under the laws, a greater share of the blessings of personal security and personal liberty than he can elsewhere hope for; . . . if a banishment of this sort be not a punishment, and among

> the severest of punishments, it will be difficult to imagine a doom to which the names can be applied.

James Madison, *Report on the Virginia Resolutions*, *in* 4 *The Debates in the Several State Conventions on the Adoption of the Federal Constitution* 555 (Jonathan Elliot ed., 1836). Thomas Jefferson similarly described the expulsion of aliens as a "grievous punishment." *Kentucky Resolutions of 1798*, *in* 4 *id.* at 543.[4] This Court has echoed these sentiments, explaining:

> Though deportation is not technically a criminal proceeding, it visits a great hardship on the individual and deprives him of the right to stay and work in this land of freedom. That deportation is a penalty—at times a most serious one—cannot be doubted. Meticulous care must be exercised lest the procedure by which he is deprived of that liberty not meet the essential standards of fairness.

Bridges v. Wixon, 326 U.S. 135, 154 (1945); *see id.* at 164 (Murphy, J., concurring) ("The impact of deportation upon the life of an alien is often as great if not greater than the imposition of a criminal sentence.").

Deportation is a particularly serious penalty for longtime lawful permanent residents, like Lee, who

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[4] The Alien and Sedition Acts passed over Madison and Jefferson's objections and expired in 1800. Madison and Jefferson's views were more enduring, however, and, "by 1832, Vice President John C. Calhoun asserted that the unconstitutionality of the Alien and Sedition laws was 'settled.'" Sarah H. Cleveland, *Powers Inherent in Sovereignty: Indians, Aliens, Territories, and the Nineteenth Century Origins of Plenary Power Over Foreign Affairs*, 81 Tex. L. Rev. 1, 98 (2002).

have "establish[ed] a life permanently in this country by developing economic, familial, and social ties indistinguishable from those of a citizen." *Demore v. Kim*, 538 U.S. 510, 544 (2003) (Souter, J., concurring in part and dissenting in part); *see Landon v. Plasencia*, 459 U.S. 21, 32 (1982) (noting that, "once an alien gains admission to our country and begins to develop the ties that go with permanent residence, his constitutional status changes accordingly"). Lee has lived his entire life in the United States since coming here as a child in 1982. He has never returned to Korea. He has resided for two decades in the same city, where he has built a successful restaurant business. He has elderly parents living here, with no other children to help care for them. This Court has characterized the interests of lawful permanent resident aliens like Lee as undeniably "weighty," *Landon*, 459 U.S. at 34, given that such individuals stand to "lose the right 'to stay and live and work in this land of freedom,'" *id.* (quoting *Bridges*, 326 U.S. at 154), as well as "the right to rejoin [their] immediate family, a right that ranks high among the interests of the individual," *id.* (citing *Moore v. City of E. Cleveland*, 431 U.S. 494, 503-04 (1977); *Stanley v. Illinois*, 405 U.S. 645, 651 (1972)).

In sum, historical tradition and this Court's jurisprudence recognize the severity of banishment from one's country. This Court has further recognized the importance of being properly informed about whether deportation is a likely consequence of a guilty plea, and that preserving the right to remain in the United States may be the primary concern of many noncitizens charged with deportable crimes. These principles are incompatible with a judicial decree that "no rational defendant charged with a deportable offense and facing 'overwhelming evidence' of guilt

would proceed to trial rather than take a plea deal with a shorter prison sentence." Pet. App. 4a.

When deciding whether to plead guilty, Lee should have been able to make an informed choice about whether a potential reduction in his sentence of a few years was worth a virtual certainty of deportation. Lee has testified that "he absolutely would have accepted the risk of litigation had he known that deportation was a consequence of his guilty plea," *id.* at 56a, and his attorney has corroborated this claim, *id.* (testimony that "had Lee known he would be deported for pleading guilty, it is probable Lee would have chosen to proceed to trial and indeed Fitzgerald would have advised him to do so"). As Lee has explained, his "life-bonding ties are in the United States," and he "had nothing to lose by going to trial if the alternative was to be deported" to Korea, because he has no connections of any sort in that country. *Id.* at 75a.

* * *

In light of the *per se* rule imposed by the Sixth Circuit, the question in this case is whether there is *any* person, facing exile from the land that has long been his home, who would try to avoid this harsh fate by risking a longer jail sentence even if the chance of prevailing was slim. The court below decided that no person would make that choice, declaring that *every* defendant facing "overwhelming evidence" of guilt would take a plea deal, even though doing so would remove all hope of remaining in this country. That artificial rule not only defies reason, but is at odds with this Court's precedent. This Court should reject it.

CONCLUSION

For the foregoing reasons, the judgment of the Sixth Circuit Court of Appeals should be reversed.

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JAE LEE,

Petitioner,

v.

UNITED STATES,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF OF *AMICI CURIAE* IMMIGRANT DEFENSE PROJECT, THE IMMIGRANT LEGAL RESOURCE CENTER AND THE NATIONAL IMMIGRATION PROJECT OF THE NATIONAL LAWYERS GUILD IN SUPPORT OF PETITIONER

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TABLE OF CONTENTS

Page

TABLE OF CONTENTS i

TABLE OF CITED AUTHORITIES iii

INTEREST OF *AMICI CURIAE* 1

INTRODUCTION AND SUMMARY OF ARGUMENT 4

ARGUMENT 8

I. A Primary Way Non-Citizens Facing Allegedly Strong Evidence Against Them Can Suffer Prejudice is From Defense Counsel's Failure to Negotiate an Alternative Disposition That Avoids the Most Serious Immigration Consequences 8

A. In a Wide Variety of Offenses, Counsel Can—and Do—Secure Pleas That Both Satisfy the Prosecutor's Goals and Avoid Deportation. 10

B. In Drug Offense Cases, There are Numerous Avenues to Avoid Mandatory Deportation or to Avoid Deportation Altogether Yet Still Meet Prosecutorial Goals. 15

State Drug Cases 17

Table of Contents

Page

Federal Drug Cases 18

II. Defense Attorneys Had Many Resources Available to Them in 2009 and Earlier to Help a Non-Citizen Client Avoid Deportation 21

III. The Prejudice Inquiry is Context-Specific and Requires Demonstration of a Reasonable Probability of Rejection of the Guilty Plea, Not of an Acquittal at Trial 25

CONCLUSION 33

TABLE OF CITED AUTHORITIES

Page

CASES

Alam v. United States,
630 F. Supp. 2d 647 (W.D.N.C. 2009) 29

Chaidez v. United States,
133 S. Ct. 1103 (2013) 27

Commonwealth v. Mohamed,
71 Va. Cir. 383 (2006) 12, 13

Commonwealth v. Sharma,
58 Va. Cir. 460 (2002) 13

DeBartolo v. United States,
790 F.3d 775 (7th Cir. 2015) 20, 21, 29

Hill v. Lockhart,
474 U.S. 52 (1985) 12, 27

INS v. St. Cyr,
533 U.S. 289 (2001) 1, 7, 10, 22

Lafler v. Cooper,
566 U.S. 156 (2012) 2, 8, 26, 27

Lee v. United States,
825 F.3d 311 (6th Cir. 2016) 26, 27

Lopez v. Gonzalez,
549 U.S. 47 (2006) 16

Cited Authorities

Page

Matter of Batista-Hernandez,
21 I. & N. Dec. 955 (BIA 1997) 19

Matter of Velasco,
16 I. & N. Dec. 281 (BIA 1987) 20

Mellouli v. Lynch,
135 S. Ct. 1980 (2015) 1, 9, 16

Missouri v. Frye,
566 U.S. 133 (2012) ..... *passim*

Padilla v. Kentucky,
381 S.W.3d 222 (Ky. Ct. App. 2012) 5

Padilla v. Kentucky,
559 U.S. 356 (2010) ..... *passim*

People v. Bautista,
8 Cal. Rptr. 3d 862 (Cal. Ct. App. 2004) 18

Pilla v. United States,
668 F.3d 368 (6th Cir. 2012) 26

Roe v. Flores-Ortega,
528 U.S. 470 (2000) 31

United States v. Orocio,
645 F.3d 630 (3d Cir. 2011) 27

United States v. Ramirez-Carillo,
No. 3:15-cr-01464-H (S.D. Cal. May 29, 2015) .. 18, 19

Cited Authorities

Page

United States v. Rueda-Carrazco,
No. 3:12-cr-00469-IEG (S.D. Cal. Jan. 17, 2012) . . . 19

Vartelas v. Holder,
566 U.S. 257 (2012) 8

Wiggins v. Smith,
539 U.S. 510 (2003) 31

Zemene v. Clark,
768 S.E.2d 684 (Va. 2015) 7, 11-12

STATUTES AND OTHER AUTHORITIES

Sixth Amendment to the U.S. Constitution 8

8 U.S.C. § 1101(a)(43)(B) 4, 15

8 U.S.C. § 1101(a)(43)(G) 11

8 U.S.C. § 1101(a)(43)(M)(i) 14

8 U.S.C. § 1101(a)(48)(B) 11

8 U.S.C. § 1226(c)(1)(B) 10

8 U.S.C. § 1227(a)(2)(A)(iii) 10

8 U.S.C. § 1227(a)(2)(B) 15

8 U.S.C. § 1229b(a) 15

Cited Authorities

Page

8 U.S.C. § 1229b(a)(3) 10

8 U.S.C. § 1229b(b) 13

18 U.S.C. § 4 19

18 U.S.C. § 641 14

18 U.S.C. § 1001 ..... 14, 19

18 U.S.C. § 3607(b) 16

21 U.S.C. § 802 15

21 U.S.C. § 841(a)(1) 18-19, 20

21 U.S.C. § 851 20

21 U.S.C. § 952 19

21 U.S.C. § 960 19

Cal. Penal Code § 1016.2(d) 9

Cal. Penal Code § 1016.3(b) 9

N.Y. Penal Law § 155.25 11

ABA Standards for Criminal Justice, Prosecution Function and Defense Function (4th ed. Apr. 2015) 6

Cited Authorities

Page

Albert Alschuler, *The Prosecutor's Role in Plea Bargaining*, 36 U. Chi. L. Rev. 50 (1968) 26

American Bar Association, Report to the House of Delegates (Aug. 2010) 16

Brief of *Amici Curiae* Nat'l Ass'n of Criminal Def. Lawyers *et al.*, *INS v. St. Cyr*, 533 U.S. 289 (2001) (No. 00-767) 22, 24

Brief of *Amici Curiae* Nat'l Ass'n of Criminal Def. Lawyers *et al.*, *Padilla v. Kentucky*, 559 U.S. 356 (2010) (No. 08-651)..... 22, 23, 24

Brief for Respondent, *Padilla v. Kentucky*, 559 U.S. 356 (2010) (No. 08-651).....4

California Criminal Defense – Procedure and Practice (CEB 2016) 3

Dan Kesselbrenner & Lory D. Rosenberg, *Immigration Law and Crimes* (2016-2 ed.)....16, 24

Defending Immigrants Partnership, Representing Immigrant Defendants: A National Guide (2005-2008) 2

Eve Brensike Primus, *Structural Reform in Criminal Defense: Relocating Ineffective Assistance of Counsel Claims*, 92 Cornell L. Rev. 679 (2007).....31

Cited Authorities

Page

Fed. Def. of San Diego, Inc., *Defending A Federal Criminal Case* (2016) 25

ILRC, *Quick Reference Chart*, www.ilrc.org/chart 3

Ira J. Kurzban, *Kurzban's Immigration Law Sourcebook: A Comprehensive Outline and Reference Tool* (15th ed. 2016) 24

Katherine Brady *et al.*, *Defending Immigrants in the Ninth Circuit: Impact of Crimes under California and Other State Laws* (10th ed. 2008, updated 2013) 3

Kit Kinports, *Criminal Procedure In Perspective*, 98 J. Crim. L. & Criminology 71 (2007) 30

Michael Holley, *Immigration Consequences of Select Tennessee Offenses*, The Defense, June-July 2008 ..... 23, 24

Nat'l Dist. Attorneys Assoc., *National Prosecution Standards* (3d ed. 2009).....6-7

Cited Authorities

Page

National Immigrant Justice Center's Defenders Initiative, Federal Defender, https://www.fd.org/navigation/select-topics-in-criminal-defense/immigration-consequences-of-conviction/subsections/national-immigrant-justice-center's-defenders-initiative.....25

Norton Tooby, *Criminal Defense of Immigrants* (2007 ed.).....24

Obligation to Advise on Immigration Consequences, Federal Defender, https://www.fd.org/navigation/select-topics-in-criminal-defense/immigration-consequences-of-conviction/subsections/obligation-to-advise-on-immigration-consequences.....24

Scott & Stuntz, *Plea Bargaining as Contract*, 101 Yale L.J. 1909 (1992).....5

Sup. Ct. R. 37.6 1

William J. Brennan, Jr., *Criminal Prosecution: Sporting Event or Quest For Truth? A Progress Report*, 68 Wash. U. L.Q. 1 (1990).....28

INTEREST OF *AMICI CURIAE*[1]

Amici are leading experts who have worked for decades at the intersection of criminal and immigration law to ensure that criminal defense counsel have the resources necessary to represent non-citizens effectively. *Amici* founded the nationwide Defending Immigrants Partnership (DIP) in 2002 to coordinate with national criminal defense organizations to help ensure that indigent non-citizen defendants are provided effective criminal defense counsel to avoid or minimize the immigration consequences of their criminal dispositions. The partners and members of DIP have participated as amicus curiae in *Mellouli v. Lynch*, 135 S. Ct. 1980 (2015), *Padilla v. Kentucky*, 559 U.S. 356 (2010), *INS v. St. Cyr*, 533 U.S. 289 (2001), and many other cases at the intersection of criminal and immigration law.

Starting well before this Court decided *Padilla*, and before the petitioner in this case was misadvised regarding the immigration consequences of his plea of guilty, *amici* provided immigration advice and training and published materials on the immigration consequences of criminal convictions that described a wide variety of methods that defense counsel can use to avoid deportation and other severe immigration consequences that can follow even relatively minor convictions. *Amici* have a strong interest in ensuring that non-citizen defendants

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1. Pursuant to Rule 37.6, *amici* affirm that no counsel for a party authored this brief in whole or in part and that no person other than *amici* and its counsel made a monetary contribution to its preparation or submission. Counsel for all parties have consented to the filing of this brief, in letters that are on file with the Clerk or submitted contemporaneously with this brief.

are not prejudiced by counsel's failure to advise, negotiate, and advocate toward the goal of avoiding unintended and unnecessarily severe immigration consequences, as required under defense counsel's clear constitutional duties to advise about immigration consequences and to plea bargain effectively that this Court set out in *Padilla*, *Missouri v. Frye*, 566 U.S. 133 (2012), and *Lafler v. Cooper*, 566 U.S. 156 (2012). *Amici* thus seek to ensure that non-citizens who are prejudiced when counsel's incompetence forecloses reasonable alternative dispositions to avoid mandatory deportation have an avenue for relief through an ineffective assistance of counsel claim.

The Immigrant Defense Project (IDP) is a nonprofit legal resource and training center that defends the legal, constitutional, and human rights of immigrants facing criminal or deportation charges. IDP supports criminal defense attorneys through individual case consultations, trainings and mentorship, development and dissemination of defense strategies to avoid deportation triggers, and publication of written resources. IDP's 20-year-old hotline provides criminal defense attorneys with free guidance to help determine the immigration impact of non-citizens' criminal convictions, charges, and plea offers, suggest alternate dispositions that may protect immigration status, and discuss post-conviction relief options. In addition, since 1998, IDP has published resource materials for criminal defense lawyers, including *Representing Immigrant Defendants in New York*, which in 2005 was adapted by DIP for defense lawyers nationwide. *See* Defending Immigrants Partnership, Representing Immigrant Defendants: A National Guide (2005-2008).

The Immigrant Legal Resource Center (ILRC) is a national organization that provides legal trainings, educational materials, and advocacy to advance immigrant rights. For thirty years ILRC has had an "Attorney of the Day" service that offers consultations on immigration law and the immigration consequences of convictions to attorneys, employees of non-profit organizations, public defenders, and others assisting immigrants. Public defender offices throughout California contract with ILRC to strategize about alternative immigration-safe dispositions in individual cases for non-citizen clients. ILRC has a number of publications specifically for defense attorneys. *See, e.g.*, Katherine Brady *et al.*, *Defending Immigrants in the Ninth Circuit: Impact of Crimes under California and Other State Laws* (10th ed. 2008, updated 2013); *California Criminal Defense – Procedure and Practice* (CEB 2016) (including chapter on defending non-citizens). ILRC also has a free online "quick reference" chart that analyzes the immigration consequences of more than 200 convictions in California, and helped create similar charts and materials analyzing offenses in Arizona, Nevada, and Washington. *See, e.g.*, ILRC, *Quick Reference Chart*, www.ilrc.org/chart (last visited Feb. 6, 2017).

The National Immigration Project of the National Lawyers Guild (NIPNLG) is a national nonprofit organization that provides legal and technical support to attorneys, legal workers, immigrant communities, and advocates seeking to advance the rights of non-citizens. For 30 years, the NIPNLG has provided legal training to the bar and the bench on the immigration consequences of criminal conduct and authored *Immigration Law and Crimes* and four other treatises published by

Thomson-Reuters. Since 2003, NIPNLG has produced a comprehensive chart, *Selected Immigration Consequences of Certain Federal Offenses.*

INTRODUCTION AND SUMMARY OF ARGUMENT

If the government's allegation of strong evidence of guilt precluded a demonstration of prejudice under *Strickland*'s second prong, then Jose Padilla—the petitioner in *Padilla* who was a 40-year lawful permanent resident, served in Vietnam, and had little connection with his country of origin—would have long ago been deported from the United States. Law enforcement found a large quantity of marijuana in his licensed commercial truck after he consented to the search. *See* Brief for Respondent at 2, *Padilla v. Kentucky*, 559 U.S. 356 (2010) (No. 08-651). When asked what the packages in the back of his truck contained, Mr. Padilla reportedly said, "maybe drugs." *Id.* at 3. Mr. Padilla litigated and lost a suppression hearing before pleading guilty in 2002 to state felony marijuana trafficking on his attorney's erroneous advice that he had been in the United States too long to be deported. *Id.*; *see also Padilla*, 559 U.S. at 359. In fact, marijuana trafficking is one of many crimes considered an "aggravated felony" under immigration law and as such it condemned Mr. Padilla to the harshest possible immigration consequences: mandatory detention and mandatory deportation. *See* 8 U.S.C. § 1101(a)(43)(B) (defining "aggravated felony" to include illicit trafficking in a controlled substance).

With the benefit of correct legal advice and proper negotiations, Mr. Padilla's case turned out differently.

After this Court ruled in Mr. Padilla's favor on the attorney competence prong of his ineffective assistance of counsel claim, *see Padilla*, 559 U.S. at 360, the Kentucky Court of Appeals on remand found prejudice in part because, "had the immigration consequences of Padilla's plea been factored into the plea bargaining process, trial counsel may have obtained a plea agreement that would not have the consequence of mandatory deportation." *Padilla v. Kentucky*, 381 S.W.3d 322, 330 (Ky. Ct. App. 2012). After his conviction was vacated, Mr. Padilla's counsel secured a "deferred prosecution" deal which avoided a guilty plea. The charges against Mr. Padilla were ultimately dismissed with prejudice after he completed supervision without further police contact. As a result, he has no conviction or other record resulting from this situation. Letter from Timothy G. Arnold, Director, Post-Trials Division, Kentucky Department of Public Advocacy (Feb. 6, 2017).[2]

When a non-citizen charged with a crime prioritizes the ability to remain in the United States, then counsel's primary aim must be to avoid a conviction that leads to deportation. Sometimes this means the non-citizen will make the rational decision to take his or her chances and go to trial. But since "plea bargaining is . . . not some adjunct to the criminal justice system . . . [but rather] *is* the criminal system," *Frye*, 566 U.S. at 144 (quoting Scott & Stuntz, *Plea Bargaining as Contract*, 101 Yale L.J. 1909, 1912 (1992)), more often it means that counsel must

2. These accounts are drawn from court decisions as well as correspondence between *Amici* and counsel or former counsel for the immigrants involved. All documentation is on file with counsel for *Amici* and is available at the Court's request.

negotiate creatively to secure a plea that avoids or at least mitigates adverse immigration consequences.

Defense counsel's ability to secure a plea or alternative disposition that preserves the non-citizen's ability to avoid deportation depends on a number of factors. First, counsel must fulfill the constitutionally mandated obligation to assess the immigration consequences of a conviction and advise non-citizen clients accordingly to determine the client's goals. *Padilla*, 559 U.S. at 369. Second, if the client's goals include avoiding deportation, counsel must identify alternative dispositions that satisfy their client's instruction. *See* Part II, *infra* (describing numerous resources available to guide defenders on bargaining to avoid unnecessarily harsh immigration consequences). Third, counsel must marshal their client's personal circumstances, including the consequences of deportation, to advocate for a favorable disposition. A non-citizen's strong ties and long residency in the United States or danger of physical harm or death if returned to his or her country of origin are precisely the sort of family, community, and justice-oriented factors that prosecutors regularly consider. *See, e.g.*, ABA Standards for Criminal Justice, Prosecution Function and Defense Function, Standard 3-4.4(a) (4th ed. Apr. 2015) ("Among the factors which the prosecutor may properly consider in exercising discretion to initiate, decline, or dismiss a criminal charge . . . are . . . whether the authorized or likely punishment or collateral consequences are disproportionate in relation to the particular offense or the offender."); *see also id.* at Standard 3-5.6(c) ("The prosecutor should consider collateral consequences of a conviction before entering into a disposition agreement."). *Cf.* Nat'l Dist. Attorneys Assoc., *National Prosecution Standards* § 4-1.3.k (3d. ed.

2009) ("Undue hardship . . . to the accused" can be a basis for declination of prosecution).

These specific yet objective factors, and not the personal predilections of a particular prosecutor, drive the prejudice prong of any ineffective assistance of counsel claim. If it is reasonably probable that—with effective assistance of counsel—the defendant would have rejected a plea offer that carried severe immigration consequences and taken his or her chances at a trial, that defendant was prejudiced by counsel's failure to inform the defendant of the plea's immigration consequences. The defendant is *also* prejudiced when it is reasonably probable under the objective circumstances of the case that he or she would have rejected the offer to allow competent defense counsel to attempt to secure a plea or other disposition that avoids deportation.

This brief illustrates the many ways that defense counsel and prosecutors can, and do, negotiate in all types of cases to meet the goals of both parties, *see St. Cyr*, 533 U.S. at 323 (noting the "great number of defendants [who] agreed to plead guilty" to keep avenues of relief from deportation open and the "prosecutors [who] have received the benefit of these plea agreements"), and how counsel's failure to pursue these reasonably probable avenues prejudices the client. *See Zemene v. Clark*, 768 S.E.2d 684, 690 (Va. 2015) (citing *Frye*, 566 U.S. at 146) ("[A] proven desire to go to trial is not the only context in which prejudice may occur where a defendant has accepted a plea agreement upon improper and inadequate advice of counsel.").

ARGUMENT

Padilla tells us that it violates the competency prong of *Strickland*'s ineffective assistance test when counsel fails to advise a client correctly about deportation consequences of a conviction. *Frye* and *Lafler* instruct that effective plea bargaining is a core part of counsel's Sixth Amendment duties. *Lafler*, 566 U.S. at 162 ("Defendants have a Sixth Amendment right to counsel, a right that extends to the plea-bargaining process."). Mr. Lee's case demonstrates how counsel's failure properly to recognize and advise a client of a plea's adverse immigration consequences can prejudice non-citizens by depriving them of the crucial opportunity to bargain for an alternative disposition that avoids harsh immigration consequences.

I. A Primary Way Non-Citizens Facing Allegedly Strong Evidence Against Them Can Suffer Prejudice is From Defense Counsel's Failure to Negotiate an Alternative Disposition That Avoids The Most Serious Immigration Consequences.

This Court has recognized that counsel with only a "rudimentary understanding of the deportation consequences of a particular criminal offense may be able to plea bargain creatively with the prosecutor in order to craft a conviction and sentence that reduce the likelihood of deportation, as by avoiding a conviction for an offense that automatically triggers the removal consequence." *Padilla*, 559 U.S. at 373; *see also Vartelas v. Holder*, 566 U.S. 257, 275 n.10 (2012) ("Armed with knowledge that a guilty plea would preclude travel abroad, aliens like Vartelas might endeavor to negotiate a plea to a nonexcludable offense—in Vartelas' case, *e.g.*, possession of counterfeit

securities"); *Mellouli*, 135 S. Ct. at 1987 (non-citizen defendants "anticipate the immigration consequences of guilty pleas in criminal court," and enter "safe harbor guilty pleas that do not expose the alien defendant to the risk of immigration sanctions") (internal quotation omitted). Indeed, the prejudice a non-citizen can suffer from counsel's failure to negotiate to avoid deportation is so clear that one state with a large immigrant population requires prosecutors to "consider the avoidance of adverse immigration consequences in the plea negotiation process as one factor in an effort to reach a just resolution." *See* Cal. Penal Code § 1016.3(b); *see also id.* § 1016.2(d) ("With an accurate understanding of immigration consequences, many non-citizen defendants are able to plead to a conviction and sentence that satisfy the prosecution and court, but that have no, or fewer, adverse immigration consequences than the original charge.").

The recognition that immigration consequences can play a vital role in plea negotiations contrasts sharply with Mr. Lee's experience with a trial lawyer who confirmed that "[t]here was never any discussion of deportation during the negotiation . . . of the plea agreement or during the sentencing. It was my understanding that the government was not seeking deportation of Mr. Jae Lee." Evid. Hr'g, at 34-35. Mr. Lee, like other similarly situated non-citizens whose counsel fails to take advantage of the myriad resources and avenues to mitigate immigration consequences, suffered prejudice when he was deprived of the opportunity to have counsel seek alternative dispositions that avoided mandatory deportation, despite the reasonable probability that he would have declined to plead guilty to pursue such alternatives, or go to trial.

Across a broad spectrum of offenses, it is possible to negotiate dispositions that either avoid deportation altogether, or avoid mandatory deportation. As the following case examples illustrate, competent counsel in state and federal criminal cases can and do avoid or mitigate adverse immigration consequences even where alternative dispositions seem difficult at first glance.

A. In a Wide Variety of Offenses, Counsel Can—And Do—Secure Pleas That Both Satisfy the Prosecutor's Goals and Avoid Deportation.

In many cases, counsel attuned to immigration consequences can secure an alternative outcome that avoids the most severe among them. They routinely do so even where there is strong evidence of guilt, particularly when their non-citizen client has strong ties to the United States. In some instances, that means avoiding an aggravated felony conviction, which results in mandatory detention and deportation. 8 U.S.C. § 1227(a)(2)(A)(iii) ("Any alien who is convicted of an aggravated felony at any time after admission is deportable."); *id.* § 1229b(a)(3) (barring cancellation of removal for lawful permanent residents convicted of an aggravated felony); *id.* § 1226(c)(1)(B) (mandating detention for individuals charged with deportability on aggravated felony conviction grounds). This outcome may allow the non-citizen to seek avenues of relief from deportation, such as cancellation of removal, not available to those convicted of aggravated felonies. *See St. Cyr*, 533 U.S. at 323 (describing cancellation of removal's statutory predecessor as "one of the principal benefits sought by defendants deciding whether to accept a plea offer or instead to proceed to trial"). In other instances, defense counsel will be able to negotiate a

plea that avoids most if not all immigration consequences altogether, sometimes to a charge that is the functional equivalent of the original charge or that carries an even higher penalty. In yet other instances, rational insistence on the constitutional right to a trial results in a better plea offer, deferred prosecution or diversion, or even dismissal of the charges as the trial date approaches.

One common example is avoiding a theft aggravated felony, one of several crimes for which "aggravated felony" status turns on the length of the sentence imposed. *See* 8 U.S.C. § 1101(a)(43)(G) (defining "aggravated felony" to include "a theft offense . . . for which the term of imprisonment [is] at least one year."). This is the case even if the sentence is suspended. *Id.* § 1101(a)(48)(B) ("any reference to a term of imprisonment or a sentence with respect to an offense is deemed to include the period of incarceration or confinement ordered by a court of law regardless of any suspension of the imposition or execution of that imprisonment or sentence in whole or in part"). In many state misdemeanor shoplifting cases, the maximum sentence under state law is one year. *See, e.g.*, N.Y. Penal Law § 155.25. Bargaining with the prosecution or advocating with the court for a sentence of 364 days—just one day less than the maximum—will avoid an aggravated felony conviction. The following examples illustrate how the prosecution's goals can often be met, and the court satisfied, by a guilty plea and a sentence of 364 suspended days or even some amount of imposed jail time.

- Michael Zemene, who lawfully entered the United States at age nine from Ethiopia as the child of an asylee, was charged with petit larceny in Virginia for stealing $33 worth of beer. *Zemene*,

768 S.E.2d at 686. His 2013 guilty plea with a 365-day suspended sentence got him out of jail earlier than the one-year maximum sentence, but his attorney failed to advise him that it also made him deportable. *Id.* at 687. In remanding the case for an evidentiary hearing on prejudice, the Virginia Supreme Court properly noted that "in advancing a claim of prejudice due to defense counsel's failure to advise him of the immigration consequences when entering a plea agreement, Zemene need not demonstrate a likelihood of acquittal at trial. Rather, the question is 'whether counsel's constitutionally ineffective performance *affected the outcome of the plea process*.'" *Id.* at 691 (quoting *Hill v. Lockhart*, 474 U.S. 52, 59 (1985)) (emphasis added); *see also Zemene*, 768 S.E.2d at 692 ("[T]he court's consideration of the rationality of a decision whether to accept or reject a plea agreement must include a properly advised defendant's desire to avoid a negative impact on his immigration status."). Before the evidentiary hearing, Mr. Zemene's counsel secured a new plea agreement whereby Mr. Zemene re-pleaded to the petit larceny charge in exchange for a negotiated 360-day suspended jail sentence. Letter from Scott C. Seguin, Attorney for Mr. Zemene (Feb. 3, 2017).

- After Waid Mohamed was convicted of grand larceny for shoplifting nearly $2,000 worth of merchandise, a Virginia court sentenced him to two years of incarceration, all suspended, and two years of probation. *Commonwealth v. Mohamed*, 71 Va. Cir. 383, 383-84 (2006). In granting his writ of *coram nobis* and resentencing Mr. Mohamed to

360 days of suspended jail time, the court found prejudice in the fact that, had the court "been made aware of the fact that Mohamed's single criminal conviction could result in deportation without the possibility of discretionary relief, an alternative sentence may have been reached." *Id.* at 385. Similarly, another Virginia trial court judge stated that, had the court known at the time of sentencing that a 12-month suspended sentence would result in an aggravated felony conviction for a 42-year old lawful permanent resident who was "gainfully employed, and married to a U.S. citizen with two U.S. citizen children," the court "undoubtedly" would have imposed an alternative sentence. *Commonwealth v. Sharma*, 58 Va. Cir. 460, 462 (2002).

In other cases, deferred prosecution or diversion can fulfill the prosecution's goal of rehabilitation and perhaps restitution, yet also allow a non-citizen to avoid deportation.

- In Nashville, Tennessee state court, C.M. was charged with felony theft of property of $10,000 or more but less than $60,000. The state alleged that C.M. stole money from a man for whom she was a caretaker. C.M.'s public defender was aware of C.M.'s pending application for non-lawful-permanent-resident cancellation of removal. *See* 8 U.S.C. § 1229b(b); Letter from Mary-Kathryn Harcombe, Assistant Public Defender, Nashville Metro Public Defender's Office (Feb. 6, 2017). Despite the serious nature of the allegations, counsel negotiated an agreement where C.M. stipulated that her name would be placed on

the Tennessee Department of Health's "Abuse Registry." In exchange, the charges against her were dismissed with prejudice. *Id.* This outcome allowed C.M. to retain eligibility for deportation relief.

- In the Eastern District of Tennessee in 2013, B.N. faced charges of theft of government funds under 18 U.S.C. § 641 and making false statements under 18 U.S.C. § 1001 for omitting information regarding her income and employment on her Section 8 housing renewal form. The government alleged that B.N. received approximately $23,000 more in rent subsidies than she was entitled to based on her actual income. B.N. had fled to the United States from Liberia about six years before she was investigated for the federal crimes. Because the fraud charges involved an amount more than $10,000, a conviction would be categorized by federal immigration authorities as an aggravated felony, even if the charge were reduced to a misdemeanor. *See* 8 U.S.C. § 1101(a)(43)(M)(i) (defining aggravated felony to include an offense that "involves fraud or deceit in which the loss to the victim or victims exceeds $10,000."). B.N.'s federal defender successfully advocated for B.N.'s admission into the federal Pretrial Diversion program based on the immigration consequences of a conviction. Under the agreement, prosecution was deferred for 18 months on various conditions, including supervision by the United States Probation Office and monthly payments towards full restitution. B.N successfully completed diversion and no immigration case against her

was ever opened. She continues to work and both of her daughters have completed graduate-level studies and are employed. Letter from Paula Voss, Assistant Federal Public Defender, Eastern District of Tennessee (Feb. 3, 2017).

B. In Drug Offense Cases, There are Numerous Avenues to Avoid Mandatory Deportation or to Avoid Deportation Altogether Yet Still Meet Prosecutorial Goals.

Drug crime convictions can be particularly problematic for non-citizens when incompetent counsel advises a guilty plea without regard for immigration consequences or after erroneously assuring the client that such consequences will not follow. On the other hand, effective defense counsel can rescue their client from deportation by pursuing one or more of the multiple alternative options available in drug cases to avoid unintended and overly harsh immigration consequences.

Offenses that qualify as "drug trafficking crime[s]" are aggravated felonies under immigration law. 8 U.S.C. § 1101(a)(43)(B). A drug conviction that necessarily involves a controlled substance as defined in 21 U.S.C. § 802—except a single possession offense for personal use of 30 grams or less of marijuana—also makes a non-citizen deportable. 8 U.S.C. § 1227(a)(2)(B)(i). However, while "controlled substance" convictions that are not aggravated felonies still trigger deportability, they do not necessarily disqualify a lawful permanent resident from seeking discretionary cancellation of removal. *See* 8 U.S.C. § 1229b(a). In certain instances, non-citizens facing a drug trafficking aggravated felony

charge will "trade any concern in order to avoid removal so that they can remain in the United States with their families." American Bar Association, Report to the House of Delegates 6 (Aug. 2010), *available at* http://www.americanbar.org/content/dam/aba/migrated/sections/criminaljustice/PublicDocuments/100C_1.authcheckdam.pdf (last accessed Feb. 8, 2017). Still, not all state felony drug convictions are aggravated felonies. *See, e.g., Lopez v. Gonzalez*, 549 U.S. 47, 53-60 (2006) (holding that South Dakota felony drug possession conviction was not a felony under the federal Controlled Substances Act and thus was not an aggravated felony). Moreover, a guilty plea to a state drug offense which includes substances not on the federal schedule may not qualify as a deportable offense if the record of conviction does not name a federally controlled substance. *See Mellouli*, 135 S. Ct. at 1984 (finding that a "conviction for concealing unnamed pills in [a] sock did not trigger removal").

Congress also provided a powerful ameliorative mechanism that enables an eligible drug offender who successfully completes probation to avoid "a disability imposed by law upon conviction of a crime, or for any other purpose." 18 U.S.C. § 3607(b). *See* Dan Kesselbrenner & Lory D. Rosenberg, *Immigration Law and Crimes* § 4.2 (2016) (opining that this expansive language would insulate a non-citizen from having a conviction for immigration purposes). Finally, pre-plea diversion such as in Mr. Padilla's case *supra*, or dismissal such as in M.I.'s case *infra*, does not qualify as a conviction and thus does not lead to deportation.

This wide variety of deportation-avoiding dispositions means that effective counsel representing non-citizens

facing drug charges can often reach outcomes that allow their clients to preserve their lawful status in the United States. The following cases illustrate how counsel can, and do, achieve this goal.

State Drug Cases

- M.I., who was from the Darfur region of Sudan and had been granted asylum, was inside his apartment when agents executed a search warrant and recovered a box containing approximately five pounds of marijuana in his bedroom. After *Miranda* warnings, M.I. admitted that he knew what was inside the box. M.I. was charged in Nashville, Tennessee state court and detained on bail on felony marijuana trafficking charges. The prosecution offered him a plea bargain to misdemeanor facilitation of sale of marijuana with a straight probationary sentence, which would have resulted in his immediate release from jail. M.I. rejected that offer after effective counsel advised him it would result in mandatory deportation. He chose to remain in jail for eight months before counsel secured his release on bond. Ultimately, the prosecution agreed to dismiss the charges against M.I. Letter from Mary-Kathryn Harcombe, Assistant Public Defender, Nashville Metro Public Defender's Office (Feb. 6, 2017). As with Mr. Padilla's eventual dismissal, described *supra*, M.I.'s outcome avoided all immigration consequences.

- Dave Bautista, a 28-year old lawful permanent resident who had lived in the United States for

17 years and had a mother, five siblings, wife, and two children who were all American citizens, was charged with and pleaded guilty to possession for sale of marijuana in California state court. *People v. Bautista*, 8 Cal. Rptr. 3d 862, 870 (Cal. Ct. App. 2004). He was sentenced to 16 months in prison. *Id.* at 866. This conviction was an aggravated felony, so it made Mr. Bautista mandatorily deportable. Remanding the case to the trial court for an evidentiary hearing, the appeals court noted how Mr. Bautista's defense attorney could have bargained to have Mr. Bautista plead to "a different but related offense" or "to 'plead up' to a non-aggravated felony even if the penalty was stiffer." *Id.* at 870. Either of those alternatives would have allowed Mr. Bautista to seek cancellation of removal. *Id.*

Federal Drug Cases

- Beatriz Ramirez-Carrillo, a lawful permanent resident for 23 years, had raised her children in Southern California and had no prior criminal history. *See* Transcript of Bond Hearing at 5, *United States v. Ramirez-Carillo*, No. 3:15-cr-01464-H (S.D. Cal. May 29, 2015), ECF No. 25. After Ms. Ramirez-Carrillo consented to a canine sniff of her car and the canine gave a positive alert for narcotics, federal agents discovered 3.2 kilograms of crystal methamphetamine hidden in the car's trunk. Complaint at ¶¶2-3, *United States v. Ramirez-Carillo*, No. 3:15-cr-01464-H (S.D. Cal. May 26, 2015), ECF No. 1. Like Mr. Lee, Ms. Ramirez-Carrillo was charged under 21 U.S.C.

§ 841(a)(1), Possession with the Intent to Distribute a Controlled Substance. *Id.* at 3. After litigating several motions and magistrate appeals, defense counsel secured a plea that will avoid deportability. The government filed a superseding Information charging Ms. Ramirez-Carrillo with making a false statement to a federal officer under 18 U.S.C. § 1001. *See* Superseding Information, *United States v. Ramirez-Carrillo*, No. 3:15-cr-01464-H (S.D. Cal. Jul. 14, 2015), ECF No. 38. She pleaded guilty to that charge and was sentenced to three years of probation and a $250 fine. *See* Judgment, *United States v. Ramirez-Carrillo*, No. 3:15-cr-01464-H (S.D. Cal. Nov. 10, 2015), ECF No. 59.

- Rafael Omar Rueda-Carrazco was stopped at the border after a canine on roving inspection alerted to his car. Border Patrol Officers found 89 pounds of marijuana in the four car tires. He was charged under 21 U.S.C. §§ 952 & 960, federal drug offenses that carry the same sentencing guidelines and mandatory minimums as 21 U.S.C. § 841. *See* Complaint, *United States v. Rueda-Carrazco*, No. 3:12-cr-00469-IEG (S.D. Cal. Jan. 17, 2012), ECF No. 1. Mr. Rueda-Carrazco's federal public defender negotiated a guilty plea to 18 U.S.C. § 4, Misprision of Felony, with four months in jail followed by two years of supervised release. *See* Judgment, *United States v. Rueda-Carrazco*, No. 3:12-cr-00469-IEG (S.D. Cal. May 15, 2012), ECF No. 26. Unlike the original charges, the negotiated plea was not an aggravated felony under immigration law. *See, e.g.*, *Matter of Batista-Hernandez*, 21 I. & N. Dec. 955, 958 (BIA 1997) (discussing that

nature of a misprision conviction does not incur deportability for the underlying crime concealed); *Matter of Velasco*, 16 I. & N. Dec. 281, 283 (BIA 1987) (holding that a misprision conviction was not a conviction "relating to" a controlled substance even when the felony concealed was distribution of a controlled substance).

- Renato DeBartolo was charged in 2011 with two counts of possession with intent to distribute and manufacturing marijuana under 21 U.S.C. § 841(a)(1), the same statute as Mr. Lee. *DeBartolo v. United States*, 790 F.3d 775, 777 (7th Cir. 2015). Mr. DeBartolo had a previous state cocaine trafficking conviction, making him eligible for a mandatory minimum of 10 years had the government filed an information under 21 U.S.C. § 851. Instead, Mr. DeBartolo pleaded guilty to the manufacturing charge and received a significant discount on sentencing, from a five-year minimum down to 25 months. *Id.* at 777. Mr. DeBartolo was brought to the United States when he was one year old, had married an American citizen, owned a construction company for some time, and had at least seven children born in the United States. *Id.* at 776-77. Based on his guilty plea to the 2011 charges, he was deported to Italy, where he had no family and did not speak the language. *Id.* at 777. Despite his previous conviction, the sentencing discount, and evidence that the government characterized as "stacked" against Mr. DeBartolo, the Seventh Circuit found prejudice in trial counsel's failure to understand and bargain to avoid the mandatory deportation consequences

> of Mr. DeBartolo's guilty plea. *Id.* at 779. The court noted how Mr. DeBartolo "could have tried to negotiate a different plea deal for an offense that does not make deportation mandatory. For example, he could have offered to plead guilty to simple possession of 30 grams of marijuana and perhaps received the same 25-month sentence." *Id.* at 779.

All of these methods of securing a plea that might avoid deportation demonstrate how it is objectively rational for someone in Mr. Lee's position to reject a plea that will lead to automatic and mandatory deportation. These numerous avenues for plea bargaining underscore how competent defense counsel, armed with an understanding of the immigration consequences of criminal convictions, could have secured such a plea. Absent successful negotiations, it would be perfectly rational for someone in Mr. Lee's position to exercise his constitutional right to trial. *See* Brief for Petitioner, at 25-29.

II. Defense Attorneys Had Many Resources Available to Them in 2009 and Earlier to Help a Non-Citizen Client Avoid Deportation.

In seeking alternative outcomes that avoid unnecessarily harsh immigration consequences, defense counsel does not operate alone, or in a vacuum. Rather, there are a number of resources in place for counsel to consult with immigration experts about consequences of particular convictions. There are also many well-regarded treatises, practical guides, charts, and other written materials widely available for defense counsel to consult on the topic of immigration consequences of

convictions. Most relevant to the prejudice inquiry, these consultations and written materials are replete with—and sometimes entirely focused on—ways to negotiate to avoid unnecessary immigration consequences, and practical tips on plea bargaining alternatives that might satisfy both parties' interests. Putting the content of those consultations and materials into action in negotiations, as demonstrated by the stories in Part I *supra*, highlights the likelihood of mitigating immigration consequences for non-citizen defendants in many instances.

For decades, criminal defense counsel have enjoyed ready access to a variety of resources to help them negotiate pleas that avoid adverse immigration consequences. *Amici*'s brief in *St. Cyr* detailed the many resources predating 1996 on the immigration consequences of criminal convictions and practical ways to avoid, through proper counseling, negotiation, and other advocacy, unnecessary immigration consequences. *See* Brief of *Amici Curiae* Nat'l Ass'n of Criminal Def. Lawyers *et al.* (NACDL) at 6-10, App. 8a-20a, *INS v. St. Cyr*, 533 U.S. 289 (2001) (No. 00-767) ("*St. Cyr Amicus*"). *Amici*'s 2009 brief in *Padilla v. Kentucky*—written the year Mr. Lee pleaded guilty—reflects that the availability of resources has multiplied considerably since *St. Cyr*. The brief describes the extensive array of resources available at the national level to assist criminal defense attorneys in advising their non-citizen clients and details how these national efforts have been successfully replicated on a local scale in jurisdictions throughout the nation. Brief of *Amici Curiae* NACDL at 25-39, App. 13a-30a, *Padilla v. Kentucky*, 559 U.S. 356 (2010) (No. 08-651) ("*Padilla Amicus*"); *see id.* at 25-26 (describing National Immigration Project of the National Lawyer Guild's more

than 3,000 instances of free assistance and nearly 10,000 listserv posts between 2003-2009); *id.* at 27-28 (describing Immigrant Defense Project's free, nationally-available hotline and the organization's individualized assistance in about 12,000 cases between 1997-2009); *id.* at 30-31 (describing Defending Immigrants Partnership's 220 training sessions between 2002-2009 for about 10,500 people and "extensive resource library of materials" available to defenders on its website at no cost).

Mr. Lee's case exemplifies the missed opportunities for plea bargaining to avoid unintended and unnecessary immigration consequences when counsel gives a defendant incorrect information about a conviction's immigration consequences. In the five years before Mr. Lee's guilty plea, Tennessee criminal defense attorney and immigration specialist Michael Holley published several practice guides and conducted trainings about immigration consequences of convictions, including a training titled: *The Long Road for the Short and Quick Plea: How the Easy Plea in Criminal Court Can Permanently Ruin Your Immigrant Client's Life. See Padilla Amicus*, App. C. at 27a-28a. The year before Mr. Lee's plea in Memphis, Holley published a short, practice-oriented piece in a newsletter of the Tennessee Association of Criminal Defense Lawyers which warned that for clients "facing an aggravated felony conviction, pleading guilty will almost always be out of the question." Michael Holley, *Immigration Consequences of Select Tennessee Offenses*, The Defense, June-July 2008, at 1, 2. The article described how defense counsel should propose "alternative dispositions" that would "both satisfy the prosecution . . . and also protect your client from immigration consequences." *Id.* at 2. It went on to lay out the six "most fruitful" ways to protect the

client, including a plea "to a similar offense that carries the same criminal penalty but lesser or no immigration consequences." *Id.* at 4; *see also Padilla Amicus* at App. 13a-16a, 27a-28a (listing numerous resources for federal criminal defenders and Tennessee practitioners).

Amici's briefs in both *St. Cyr* and *Padilla* reference the leading comprehensive treatises for defense attorneys with non-citizen clients. Many of those remain available and have been updated. *See, e.g.*, Dan Kesselbrenner & Lory D. Rosenberg, *Immigration Law and Crimes* (2016-2ed.); Ira J. Kurzban, *Kurzban's Immigration Law Sourcebook: A Comprehensive Outline and Reference Tool* (15th ed. 2016); Norton Tooby, *Criminal Defense of Immigrants* (2007 ed., updated monthly).

Counseling about and negotiation to avoid severe immigration consequences was routine among informed and effective criminal defense counsel in 2009, when Mr. Lee pleaded guilty. Since *Padilla*, the local, state, and national resources and structures in place for criminal defense counsel representing non-citizen clients have grown even more numerous. For example, the Training Division of the Defender Services Office (DSO) maintains a page, "Immigration Consequences of Conviction" which has tools, manuals, and links to resources on a variety of immigration topics related to federal criminal defense practice. *Obligation to Advise on Immigration Consequences*, Federal Defender, https://www.fd.org/navigation/select-topics-in-criminal-defense/immigration-consequences-of-conviction/subsections/obligation-to-advise-on-immigration-consequences (last visited Feb. 5, 2017). Since 2011, the DSO has partnered with Heartland Alliance's National Immigrant Justice Center

"to provide training and resources to CJA practitioners around the country on immigration-related issues." There is a hotline and email address, with the promise of an attorney's response to inquiries within 24 hours. *National Immigrant Justice Center's Defenders Initiative*, Federal Defender, https://www.fd.org/navigation/select-topics-in-criminal-defense/immigration-consequences-of-conviction/subsections/national-immigrant-justice-center's-defenders-initiative (last visited Feb. 5, 2017); *see also* Fed. Def. of San Diego, Inc., *Defending A Federal Criminal Case* (2016) (including chapter on "Special Considerations in Representing Noncitizen Defendants").

The prejudice suffered by non-citizens deprived of the opportunity to bargain for a plea that avoids deportation stands in stark relief against the backdrop of numerous immigration resources available to counsel to help develop alternative pleas that allow the government to fulfill its deterrent and retributive goals. Defense counsel who fail to avail themselves of such advice, training, and resources, much of it free and publicly available, prejudice their non-citizen clients by depriving them of the opportunity to make truly informed decisions about whether to plead guilty, go to trial, or renegotiate to obtain a plea offer or alternative disposition that allows them to remain in the country that they consider their home.

III. The Prejudice Inquiry is Context-Specific and Requires Demonstration of a Reasonable Probability of Rejection of the Guilty Plea, Not of an Acquittal at Trial.

Under the Sixth Circuit's erroneous approach to the prejudice prong, the most egregious misadvice by counsel

can never prejudice a defendant so long as the evidence against that defendant appears to be very strong. This is because, according to the opinion below, "no rational defendant charged with a deportable offense and facing 'overwhelming evidence' of guilt would proceed to trial rather than take a plea deal with a shorter prison sentence." *Lee v. United States*, 825 F.3d 311, 314 (6th Cir. 2016) (quoting *Pilla v. United States*, 668 F.3d 368, 373 (6th Cir. 2012)). This statement reveals a fundamental misunderstanding of the way the criminal justice system actually works, and a retreat from this Court's significant inroads into correcting that misunderstanding in *Padilla*, *Lafler*, and *Frye*. *See, e.g.*, *Frye*, 566 U.S. at 144 ("In today's criminal justice system, . . . the negotiation of a plea bargain, rather than the unfolding of a trial, is almost always the critical point for a defendant"). In the actual criminal justice system, defendants are often overcharged, counsel who function effectively seek favorable plea offers that fulfill the client's goals, plea offers often get more favorable as the case moves towards trial, and the relatively rare trial frequently reveals unexpected evidence and sometimes a result not obvious from the government's charging documents. *See, e.g.*, Part I.B *supra*, Cases of M.I. and Ramirez-Carrillo. *See also* Albert Alschuler, *The Prosecutor's Role in Plea Bargaining*, 36 U. Chi. L. Rev. 50, 85-105 (1968) ("The Problem of Overcharging"). The narratives in Part I of this brief, Mr. Lee's Merits brief, and the brief of *Amici* Asian Americans Advancing Justice are replete with such examples. *See* Part I. *supra*; Brief for Petitioner, at 25; Brief of *Amici Curiae* Asian Americans Advancing Justice *et al.*, at 11-18. The Sixth Circuit effectively applied, and the government here seeks, a *per se* test for proving prejudice. Yet this Court "has never required an affirmative demonstration of likely

acquittal at such a trial as the *sine qua non* of prejudice." *United States v. Orocio*, 645 F.3d 630, 643 (3d Cir. 2011), *abrogated on other grounds by Chaidez v. United States*, 133 S. Ct. 1103 (2013).

As this Court has made clear, the prejudice prong of an ineffective assistance of counsel claim involves a context-specific inquiry. Starting with *Strickland*, the prejudice inquiry has asked whether there is "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different," 466 U.S. at 694, a standard that may include but does not end at the prospect of an acquittal after trial. *Id.* ("A reasonable probability is a probability sufficient to undermine confidence in the outcome"). The Sixth Circuit referred to *Hill v. Lockhart*'s statement that to prevail, a defendant must show "a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial." *Lee*, 825 F.3d at 313 (quoting *Hill*, 474 U.S. at 59). Yet *Hill* also recognized that courts must "focus[ ] on whether counsel's constitutionally ineffective performance affected the outcome *of the plea process*." 474 U.S. at 59 (emphasis added). If there were any question that a trial-outcome analysis is relevant in some contexts but not others, and that the appropriate standard for proving prejudice more broadly addresses the outcome of the plea process, this Court put that to rest in *Lafler v. Cooper*: "The fact that respondent is guilty does not mean he was not entitled by the Sixth Amendment to effective assistance or that he suffered no prejudice from his attorney's deficient performance during plea bargaining." 566 U.S. at 169; *id.* at 174 ("[R]espondent has shown that but for counsel's deficient performance there is a reasonable probability he and the trial court would have accepted the guilty plea.").

Recognizing that reasonable probability of a different outcome in the plea bargaining process is the proper prejudice inquiry, however, does not answer the question of *how* a defendant can meet his burden in this regard. *Strickland* instructs that the standard requires demonstrating something more than "some conceivable effect" yet less than a "more likely than not" effect on outcome. *Strickland*, 466 U.S. at 693; *see also id.* at 694 ("The result of a proceeding can be rendered unreliable, and hence the proceeding itself unfair, even if the errors of counsel cannot be shown by a preponderance of the evidence to have determined the outcome."). And in *Padilla*, the Court held that "to obtain relief . . . a petitioner must convince the court that a decision to reject the plea bargain would have been *rational under the circumstances*" – not that he or she would have won at trial. 559 U.S. at 372 (emphasis added).

Determining whether a rational person in the petitioner's circumstances would have rejected the plea given correct immigration information and available outcomes through effective plea bargaining is an objective inquiry. However, the government's prediction of how a trial would have unfolded is not the only "objective" factor at issue,[3] and is not particularly relevant when the

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3. Indeed, it is worth noting that strength of the evidence is often less objective than other factors. Particularly when a guilty plea happens early, a case's apparent strength will come from the government's charging document and perhaps supporting affidavits by law enforcement. At this juncture, defense counsel may not yet have conducted discovery nor investigated the case or even fully explored defenses or other trial strategies. *See* William J. Brennan, Jr., *Criminal Prosecution: Sporting Event or Quest For Truth? A Progress Report*, 68 Wash. U. L.Q. 1, 2 (1990) ("The essential purpose

claim of prejudice flows from counsel's failure to secure a plea or other disposition that avoids at least the most serious immigration consequences. A petitioner's personal circumstances are always highly relevant, including his ties to this country and his relationship, if any, with his country of origin. *See, e.g.*, *DeBartolo*, 790 F.3d at 778 (finding it "unquestionabl[e]" that a 48-year-old who immigrated to the United States at age one with his family, married an American citizen, had at least seven American citizen children, had owned a small business in Indiana, and had no family in Italy or knowledge of the language, would have taken his chances at trial had he known the deportation consequences of his guilty plea); *Alam v. United States*, 630 F. Supp. 2d 647, 653–54 (W.D.N.C. 2009) (finding no "reason to doubt" petitioner's claim that he would have rejected a guilty plea but for counsel's erroneous assurances it would not make him deportable, in light of objective evidence of petitioner's 25 years in the U.S., his U.S. citizen children, and his successful business here). A defendant's testimony about his willingness to reject one plea with the goal of securing a disposition more favorable to his immigration status, or to risk a trial despite the possibility or even likelihood of a longer period of incarceration, are also factors that

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of permitting a criminal defendant to engage in pretrial discovery of the prosecution's case is to enhance the truth-finding process so as to minimize the danger that an innocent defendant will be convicted"). *Cf.* Evid. Hr'g, at 36-37, 47 (Mr. Lee testified, and the court deemed his testimony credible, that trial counsel never reviewed the elements of the crime charged with him nor explained what the government would have had to prove at trial to secure a conviction, that he was unaware there was a confidential informant involved in his case until he saw the Pre-Sentence Report, and that counsel failed to show him photographs of the drugs recovered from his apartment).

can be viewed through the objective lens of a reasonable, similarly-situated defendant. Courts are well equipped to assess individual facts and circumstances objectively, and do so in a number of different situations. *See generally* Kit Kinports, *Criminal Procedure In Perspective*, 98 J. Crim. L. & Criminology 71 (2007) (describing various such contexts).

Just as courts reviewing ineffective assistance claims are well-equipped to view the defendant's personal circumstances through an objective lens, they must heed this Court's caution that the prejudice inquiry proceed without regard for the "idiosyncracies of the particular decisionmaker." *Strickland*, 466 U.S. at 695. The prejudice inquiry's objective nature narrows the scope of evidence a defendant must offer at a post-conviction hearing to demonstrate the likelihood of a different result but for counsel's ineffectiveness. It would be unfair and improper to require defendants to show that the particular prosecutor in the particular case would have offered a particular alternative plea.

Such a standard would mean a prosecutor's office could effectively immunize itself from all ineffective assistance claims based on prejudice relating to alternative plea outcomes by attesting to its refusal to offer alternative pleas. Petitioners in post-conviction proceedings cannot reasonably be expected to secure testimony from the very prosecutor's office that opposes his petition, about how it may have offered an alternative plea. Such a standard would also mean that defendants in one jurisdiction would carry a different burden from defendants in another jurisdiction. Finally, it is worth noting that many ineffective assistance of counsel claims will be

pursued by *pro se* petitioners, *see* Eve Brensike Primus, *Structural Reform in Criminal Defense: Relocating Ineffective Assistance of Counsel Claims*, 92 Cornell L. Rev. 679, 681 (2007), and it would be unfair to expect a *pro se* petitioner, often incarcerated, to develop such testimony at a hearing or in a filing. *See Roe v. Flores-Ortega*, 528 U.S. 470, 486 (2000) ("[I]t is unfair to require an indigent, perhaps *pro se*, defendant to demonstrate that his hypothetical appeal might have had merit before any advocate has ever reviewed the record in his case in search of potentially meritorious grounds for appeal.") (emphasis deleted). While in a rare case a well-resourced post-conviction petitioner might find a criminal defense lawyer who has secured a more favorable outcome in a similar case and who is willing to testify, or even a former prosecutor from the jurisdiction willing to testify about their former office's plea policies, that type of evidentiary bar is both unrealistic and unfair, particularly to those without counsel. It is for these reasons that, with respect to the competency prong of the ineffective assistance test, this Court has used prevailing national norms to determine the reasonableness of counsel's performance. *See, e.g., Padilla*, 559 U.S. at 366-68; *Wiggins v. Smith*, 539 U.S. 510, 522 (2003). This avoids the troubling race-to-the-bottom that might occur if the constitutional floor were set at the lowest local level of performance.

Part I *supra* illustrates the spectrum of reasonable alternative outcomes in a variety of circumstances, including Mr. Lee's. The fact that the record below does not refer to alternative offers that were made and rejected should not be surprising. After all, trial counsel believed Mr. Lee would not be deported and so did not even attempt to negotiate to avoid that result. It is at the pre-trial stage

of a criminal case, when defendants have a right to counsel, where effective bargaining to meet a defendant's goals, including immigration goals, must happen. Even though the Sixth Circuit in the opinion below erroneously stated that the record was devoid of evidence that Mr. Lee's counsel could have secured a plea that would have avoided mandatory deportation,[4] the relevant inquiry is whether it is reasonably probable that Mr. Lee would have rejected the plea that led to mandatory deportation and instructed his counsel to seek an alternative.

"A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Strickland*, 466 U.S. at 694. All of the possibilities outlined in Part I *supra* undermine confidence in the outcome for Mr. Lee, namely, conviction on the only count with which he was charged, an aggravated felony rendering him presumptively and mandatorily deportable. The prejudice inquiry is not about whether a defendant made a rational decision to plead guilty with erroneous immigration advice from counsel. Rather, it is about whether a decision to *reject* the plea would have been rational had that defendant been fully and correctly informed that it would render him deportable, and had counsel used immigration consequences as a touchstone in counseling the client about any plea and in negotiations.

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4. At the evidentiary hearing, trial counsel was asked whether, had Mr. Lee "been offered three years and reliable assurances that he would not be deported, would he have taken that?" Trial counsel responded: "He would have." Evid. Hr'g, at 124. In addition, Mr. Lee's trial counsel testified that, although the case "probably was a losing proposition in someway [o]f course, you know, as defense counsel, you have a lot of losing propositions that you end up coming out better than you think. Probably the best -- the best thing that could have come out of this was maybe a possession, that's it." *See id.* at 115-16.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted,

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IN THE

Supreme Court of the United States

JAE LEE,

Petitioner,

v.

UNITED STATES,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF OF THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
INTEREST OF *AMICUS CURIAE*	1
SUMMARY OF ARGUMENT	2
ARGUMENT	3
I. COURTS ARE IMPROPERLY POSITIONED TO ASSESS WHETHER THE DECISION TO GO TO TRIAL IS RATIONAL	3
II. REJECTING A PLEA BARGAIN IS RATIONAL BECAUSE IT MIGHT LEAD TO MORE FAVORABLE OUTCOMES	7
III. "FUNNY THINGS HAPPEN" AT TRIAL	9
IV. PRESUMING THAT DEFENSE COUNSEL WILL USE STRATEGY AS A GUISE FOR INCOMPETENCE OFFENDS THE ETHICAL STANDARDS DEFENSE ATTORNEYS ARE BOUND TO UPHOLD	15
CONCLUSION	18

TABLE OF AUTHORITIES

CASES Page

Banks v. *Dretke*, 540 U.S. 668 (2004) 15, 17
Berger v. *United States*, 295 U.S. 78 (1935) 16
Brady v. *Maryland*, 373 U.S. 83 (1963) 15
Commonwealth v. *Lavrinenko*, 38 N.E.3d 278 (Mass. 2015) 7
Commonwealth v. *Marinho*, 981 N.E.2d 648 (Mass. 2013) 6
Connick v. *Thompson*, 563 U.S. 51 (2011) 16
Crawford v. *Washington*, 541 U.S. 36 (2004) 7
Dean v. *Sullivan*, 118 F.3d 1170 (7th Cir. 1997) 15
DeBartolo v. *United States*, 790 F.3d 775 (7th Cir. 2015) 5, 6, 11, 14
Gideon v. *Wainwright*, 372 U.S. 335 (1963) 17
Giglio v. *United States*, 405 U.S. 150 (1972) 16
INS v. *St. Cyr.*, 533 U.S. 289 (2001) 4
Jones v. *Barnes*, 463 U.S. 745 (1983) (Brennan and Marshall, J.J., dissenting) 9
Kimmelman v. *Morrison*, 477 U.S. 365 (1986) 17
Kyles v. *Whitley*, 514 U.S. 419 (1995) 16
Miller UK Ltd. v. *Caterpillar, Inc.*, 17 F. Supp. 3d 711 (N.D. Ill. 2014) 10
Missouri v. *Frye*, 566 U.S. 133 (2012) 7
Padilla v. *Kentucky*, 559 U.S. 356 (2010) 4, 16
People v. *Guzman*, 24 N.E.3d 831 (Ill. App. Ct. 2014), *aff'd*, 43 N.E.3d 954 (Ill. 2015) 5, 14

TABLE OF AUTHORITIES—continued

Page

People v. *Lopez*, 41 N.E.3d 664 (Ill. App. Ct. 2015) 5
Rodriguez Rodriguez v. *Munoz Munoz*, 808 F.2d 138 (1st Cir. 1986) 15
Runnels v. *Hess*, 653 F.2d 1359 (10th Cir. 1981) 15
Schneiderman v. *United States*, 320 U.S. 118 (1943) (Douglas, J., concurring) 17
State v. *Paredez*, 136 N.M. 533 (2004) 4
Strickland v. *Washington*, 466 U.S. 668 (1984) 10
United States v. *Flores-Mejia*, 759 F.3d 253 (3d Cir. 2014) (en banc) (Greenaway, Jr., Smith, Shwartz, and Sloviter, JJ., dissenting, and Fuentes, J., joining in part) 15
United States v. *Orocio*, 645 F.3d 630 (3d Cir. 2011), *abrogated on other grounds by Chaidez* v. *United States*, 133 S. Ct. 1103 (2013) 9
United States v. *Pielago*, 135 F.3d 703 (11th Cir. 1998) 15
United States v. *Reyes*, 102 F.3d 1361 (5th Cir. 1996) 15
Wearry v. *Cain*, 136 S. Ct. 1002 (2016) 15
Williamson v. *Reynolds*, 904 F. Supp. 1529 (E.D. Okla. 1995), *abrogated on other grounds by Nguyen* v. *Reynolds*, 131 F.3d 1340 (10th Cir. 1997) 7
Yates v. *United States*, 135 S. Ct. 1074 (2015) 7

TABLE OF AUTHORITIES—continued

Page

COURT DOCUMENTS

Brief for the Petitioner, *Lee* v. *United States*, No. 16-327 (Feb. 1, 2017) 6, 7, 9, 10

Information, *State* v. *Zimmerman*, No. 1712F04573, 2012 WL 1207410 (Fla. Cir. Ct. Apr. 11, 2012) 11

People v. *Simpson*, No. BA097211 (Cal. Super. Ct. Oct. 3, 1995) 11

Petition for a Writ of Certiorari, *Lee* v. *United States*, No. 16-327 (Sept. 6, 2016) 4, 15

United States v. *Bundy*, No. 3:16-cr-00051-BR (D. Or. Oct. 27, 2016) 12

OTHER AUTHORITIES

A Funny Thing Happened on the Way to the Forum (United Artists 1966) 9, 10

ABA Model Rules of Professional Conduct 16

ABA Standards for Criminal Justice: Prosecution Function and Defense Function (Am. Bar Ass'n 1993, 3 eds.), http://www.americanbar.org/content/dam/aba/publications/criminal_justice_standards/prosecution_defense_function.authcheckdam.pdf 15, 16, 17

Adam Serwer, *Why George Zimmerman was acquitted*, MSNBC (July 14, 2013), http://www.msnbc.com/msnbc/why-george-zimmerman-was-acquitted 12

TABLE OF AUTHORITIES—continued

Page

Carolyn Lumsden, *Amy Carter, Abbie Hoffman Acquitted*, Associated Press (Apr. 15, 1987), http://www.apnewsarchive.com/1987/Amy-Carter-Abbie-Hoffman-Acquitted/13idbb87fa5908b15ecaf7bbecb46eea23b5 13

César Cuauhtémoc García Hernández, *7 Cir: Migrant Defendants Entitled to Roll the Dice with a Jury*, crImmigration (July 16, 2015), http://crimmigration.com/2015/07/16/7-cir-migrant-defendants-entitled-to-roll-the-dice-with-a-jury/ 3

Chelsea J. Carter and Holly Yan, *Why this verdict? Five things that led to Zimmerman's acquittal*, CNN (July 15, 2013), http://www.cnn.com/2013/07/14/us/zimmerman-why-this-verdict 12

Daniel A. Horwitz, *Actually,* Padilla *Does Apply to Undocumented Defendants*, 19 Harv. Latino L. Rev. 1 (2016) 8

Dave DeLuca, *On Oct. 3, 1995: O.J. is acquitted*, Buffalo News (Oct. 3, 2016), http://buffalonews.com/2016/10/03/oct-3-1995-o-j-aquitted/ 11

Handbook for Trial Jurors Serving in the United States District Courts, https://www.tnwd.uscourts.gov/pdf/content/PetitHandbook.pdf..... 14, 15

Heidi Altman, *Prosecuting Post*-Padilla: *State Interests and the Pursuit of Justice for Noncitizen Defendants*, 101.1 Geo. L. J. 1 (2012) 5

TABLE OF AUTHORITIES—continued

Page

Hon. Alex Kozinski, *Criminal Law 2.0*, 44 Geo. L.J. Ann. Rev. Crim. Proc. iii (2015) 13, 14, 17

Jennifer Welch, *Defending Against Deportation: Equipping Public Defenders to Represent Noncitizens Effectively*, 92 Cal. L. Rev. 541 (2004) 6

John Caher, *Tag Team of Lawyers Drawn to Alien's Plight*, 231 N.Y.L.J. 1 (2005) 14

Memorandum from Jeh Charles Johnson, Sec'y, U.S. Dep't of Homeland Sec. to Thomas S. Winkowski et al. (Nov. 20, 2014), https://www.dhs.gov/sites/default/files/publications/14_1120_memo_prosecutorial_discretion.pdf..... 8

Memorandum from John Morton, Dir., U.S. Immigration and Customs Enf't to All Field Office Dirs. et al. (June 17, 2011), https://www.ice.gov/doclib/secure-communities/pdf/prosecutorial-discretion-memo.pdf 8

Paula Hannaford-Agor et. al., *Why Do Hung Juries Hang?* 251 Nat'l Inst. Justice J. 25 (July 2004) 10

Paula L. Hannaford-Agor, *When all eyes are watching: Trial characteristics and practices in notorious trials*, 91 Judicature 197 (2008) 10

TABLE OF AUTHORITIES—continued

Page

Robert Reinhold, *AFTER THE RIOTS; Judge Sets Los Angeles for Retrial Of Officer in Rodney King Beating*, N.Y. Times (May 23, 1992), http://www.nytimes.com/1992/05/23/us/after-riots-judge-sets-los-angeles-for-retrial-officer-rodney-king-beating.html?pagewanted=all 12

Sam Levin and Lauren Dake, *Bundy Brothers found not guilty of conspiracy in Oregon militia standoff*, The Guardian (Oct. 27, 2016), https://www.theguardian.com/us-news/2016/oct/27/oregon-militia-standoff-bundy-brothers-not-guilty-trial. 12, 13

Timothy Egan, *NOT GUILTY: THE JURY; One Juror Smiled; Then They Knew*, N.Y. Times (Oct. 4, 1995), http://www.nytimes.com/1995/10/04/us/not-guilty-the-jury-one-juror-smiled-then-they-knew.html.... 11

Twelve Angry Men (United Artists 1957) 14

INTEREST OF *AMICUS CURIAE*[1]

The National Association of Criminal Defense Lawyers (NACDL) is a nonprofit voluntary professional bar association that works on behalf of criminal defense attorneys to ensure justice and due process for those accused of crime or misconduct. NACDL was founded in 1958. It has a nationwide membership of many thousands of direct members, and up to 40,000 with affiliates. NACDL's members include private criminal defense lawyers, public defenders, military defense counsel, law professors, and judges. NACDL is the only nationwide professional bar association for public defenders and private criminal defense lawyers. NACDL is dedicated to advancing the proper, efficient, and just administration of justice, including issues involving the constitutional standards for effective criminal defense counsel. A core component of its mission is to foster the integrity of the criminal defense profession.

NACDL has particular interest in this case because the Sixth Circuit's position (and that of the Second, Fourth, and Fifth Circuits) reflects a fundamental misunderstanding of the role of appellate courts and would permit them to impermissibly speculate as to

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[1] Pursuant to Supreme Court Rule 37.6, *amicus curiae* states that no counsel for any party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus* made such a monetary contribution. Both parties have submitted letters of consent to the filing of *amicus* briefs with the Clerk of the Court pursuant to Rule 37.3 (a).

what choices criminal defendants might make had they been properly advised by their counsel with respect to deportation risks—a position that undermines this Court's recognition that it is the defendant's unassailable right to decide whether to go to trial. Judicial reasoning about whether a defendant would have chosen to take his case to trial improperly usurps this right.

SUMMARY OF ARGUMENT

A criminal defendant alone holds the right to choose to go to trial. Not defense counsel, not the prosecutor, and not the court. This right is especially critical when the alternative to trial is deportation. The contours of this right are sharpened by three additional arguments urging the Court to reverse the Sixth Circuit and grant Mr. Lee's § 2255 petition.

First, the Sixth Circuit's reasoning constitutes improper appellate intrusion into an area in which appellate courts have no business; namely, a defendant's decision whether or not to invoke the right to trial. A defendant may choose to go to trial for any reason, or for no reason at all. Part I explains why the exercise of that right cannot be subject to a priori tests for rationality. Even if courts could impose such a test, the nature of our adversarial system makes rational assessment impossible.

Second, the decision to invoke his right to trial grants a noncitizen defendant the chance to avoid deportation, and that chance in itself makes declining a plea bargain rational. Part II discusses why declining one plea bargain may present opportunities for a defendant to negotiate a more favorable plea deal and avoid deportation. Part III illuminates how other opportunities to remain in the United States may also materialize during the trial: the unpredictable out-

comes of "can't win" cases amply demonstrate that such cases can indeed be won based upon much more than "whimsy," "caprice," or "nullification."

Third, the Sixth Circuit's reasoning rests on a disparaging and stale claim that the result is necessary because otherwise defense counsel may act in bad faith and purposely withhold information regarding deportation. Part IV cautions that such a presumption will erode the integrity of our criminal justice system, and will disrupt the longstanding notion that lawyers and judges act in good faith. The Court must not now countenance any such assumption that members of the bar and officers of the court would act contrary to their ethical duties.

ARGUMENT

I. COURTS ARE IMPROPERLY POSITIONED TO ASSESS WHETHER THE DECISION TO GO TO TRIAL IS RATIONAL.

An appellate court's speculation about whether a defendant would have accepted a plea deal in spite of unwarned deportation risks fallaciously begs the question at hand. While "harmless error" tests allow appellate courts to speculate about the fact a rational trier of fact may have found, most judges "have very limited experience with the high-risk decisions facing criminal defendants. Few have ever represented defendants and fewer still have ever sat in the position of a defendant."[2] And none have ever occupied the seat of a non-citizen defendant faced with a plea bargain.

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[2] César Cuauhtémoc García Hernández, *7 Cir: Migrant Defendants Entitled to Roll the Dice with a Jury*, crImmigration (July 16, 2015), http://crimmigration.com/2015/07/16/7-cir-migrant-defendants-entitled-to-roll-the-dice-with-a-jury/.

The Sixth Circuit's speculation that "no rational defendant charged with a deportable offense and facing overwhelming evidence of guilt would proceed to trial rather than take a plea deal with a shorter prison sentence" presumes that the dispositive factor for defendants in plea negotiations is the period of incarceration. Petition for a Writ of Certiorari at 4a, *Lee* v. *United States*, No. 16-327 (Sept. 6, 2016) (hereinafter "Cert. Pet."). Deportation, however, is "often [ ] the harshest consequence of a non-citizen criminal defendant's guilty plea" and so immigration consequences, rather than term of imprisonment, may dominate a defendant's calculus in determining whether or not to plead guilty. *State* v. *Paredez*, 136 N.M. 533, 539 (2004). This Court has also recognized the influence the potential for deportation has on a defendant's decision to accept a plea bargain: "deportation is an integral part—indeed, sometimes the most important part—of the penalty that may be imposed on noncitizen defendants who plead guilty to specified crimes." *Padilla* v. *Kentucky*, 559 U.S. 356, 364 (2010). This view even predates *Padilla*: "[p]reserving the client's right to remain in the United States may be more important to the client than any potential jail sentence." *INS* v. *St. Cyr.*, 533 U.S. 289, 322–23 (2001) (internal quotations and citations omitted).

Here the Sixth Circuit offered that there was "overwhelming evidence" of Lee's guilt. Cert. Pet. at 4a. But that would not make it "irrational" for a defendant to elect trial and risk a longer sentence in hopes of avoiding deportation. Indeed, it is inconsistent with any defendant's right to a fair trial for an appellate court to insist that a defendant would not have exercised that right.

The Seventh Circuit, by contrast, articulated at least four reasons why it would be rational for a criminal defendant like Mr. Lee to reject his plea deal. See *DeBartolo* v. *United States*, 790 F.3d 775, 779–80 (7th Cir. 2015). First, it is entirely rational for a defendant to reject a plea deal that would make him "deportable" in order to use the leverage of a trial to negotiate a different deal on a charge that would not make one "deportable." See *id.* at 776–79. In one case, a noncitizen defendant charged with a deportable misdemeanor offense of violating an order of protection plead guilty instead to felony witness dissuasion, a predicate strike under California's three-strikes law, with a 364-day sentence to preserve his eligibility for relief in removal proceedings.[3] Contrary to the Sixth Circuit's rational, the reasonableness of a defendant's decision cannot be measured solely by the strength of the evidence. See *People* v. *Lopez*, 41 N.E.3d 664, 677 (Ill. App. Ct. 2015) (holding that a decision would have been "perfectly reasonable" where the defendant claims prejudice because "he would have rather have faced trial or entered a different plea rather than be deported"). Second, it is rational to take a high risk on a longer prison term if the reward of a not guilty verdict is the ability to remain with his or her family and friends in the United States rather than forever being barred. See also *People* v. *Guzman*, 24 N.E.3d 831, 839 (Ill. App. Ct. 2014), *aff'd*, 43 N.E.3d 954 (Ill. 2015) ("defendant's family ties and bonds to the United States provide a rational basis to reject a plea deal.").

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[3] Heidi Altman, *Prosecuting Post-*Padilla: *State Interests and the Pursuit of Justice for Noncitizen Defendants*, 101.1 Geo. L. J. 1, 29 (2012).

Third, even if a defendant accepts the inevitability of a guilty verdict, that defendant might rationally choose a longer prison sentence in the United States over a shorter one with swifter deportation. Fourth, a defendant who risks a longer prison term might pin his hopes, however slim, on an intervening change in the substance of immigration law or the priorities of enforcement officials.[4] See Brief for the Petitioner at 27, *Lee* v. *United States*, No. 16-327 (Feb. 1, 2017) (hereinafter "Pet'r Br.").

Nor is it proper for the Sixth Circuit to overlay "rationality" on the exercise of fundamental rights. Defendants may choose trial for any reason or for no reason. See *DeBartolo*, 790 F.3d at 779 ("a criminal defendant cannot be denied the right to a trial, and forced to plead guilty, because he has no sturdy legal leg to stand on but thinks he has a chance that the jury will acquit him even if it thinks he's guilty."). Likewise, defendants may invoke their right to counsel or the privilege against self-incrimination for any reason or no reason. Appellate courts are in no position to second-guess whether a defendant made a rational choice to talk to the police despite *Miranda* warnings. Certainly, then, it follows that they have no authority to invalidate waivers of such rights on the ground that no rational defendant in that predicament would have done the same.

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[4] *Commonwealth* v. *Marinho*, 981 N.E.2d 648, 662 n.21 (Mass. 2013) ("[n]ew avenues may open in the ever-changing field of immigration law that change the legal landscape for undocumented people."); Jennifer Welch, *Defending Against Deportation: Equipping Public Defenders to Represent Noncitizens Effectively*, 92 Cal. L. Rev. 541, 567 (2004) ("[a]s one public defender has noted, '[t]he law can change from morning to afternoon.'").

II. REJECTING A PLEA BARGAIN IS RATIONAL BECAUSE IT MIGHT LEAD TO MORE FAVORABLE OUTCOMES.

The Sixth Circuit's reasoning begs the question in yet another way: it presumes that a defendant's only hope would be jury nullification. But our criminal justice system is an adversarial one and not a civil-law investigation by learned tribunal. At its core is the presumption of innocence and the further process involves a host of tests that go far beyond prosecutorial claims of proof. Foregoing a guilty plea may well represent a strategic choice to change the calculus of a case – from early plea negotiations, through mid-trial plea negotiations even to post-verdict efforts.[5] Dispositive motions may uncover constitutional or statutory issues previously considered to be foreclosed[6] and motions *in limine* may find new evidentiary flaws with incriminating evidence.[7] Additionally, a defendant may rationally forego a guilty plea in the hopes of negotiating a more favorable plea. See Pet'r Br. at 20–21; *Commonwealth* v. *Lavrinenko*, 38 N.E.3d 278, 291–92 (Mass. 2015).

For example, all undocumented immigrants, regardless of immigration status, may avoid deporta-

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[5] *See Missouri* v. *Frye*, 566 U.S. 133, 143 (2012) ("the plea-bargaining process is often in flux, with no clear standards or timelines . . .").

[6] *See Yates* v. *United States*, 135 S. Ct. 1074 (2015) (disposal of undersized fish did not qualify as destruction of a tangible object); *Crawford* v. *Washington*, 541 U.S. 36 (2004) (key testimony excluded because it violated the Confrontation Clause).

[7] *See Williamson* v. *Reynolds*, 904 F. Supp. 1529, 1554 (E.D. Okla. 1995), *abrogated on other grounds by Nguyen* v. *Reynolds*, 131 F.3d 1340 (10th Cir. 1997) (government's criminalist "admitted that hair comparisons are not absolute identifications like fingerprints").

tion through prosecutorial discretion, defined as the agency's authority "to decide to what degree to enforce the law against a particular individual."[8] Some may be eligible to apply for relief from deportation under the Convention Against Torture, through seeking adjustment of status, or through qualifying for one of several specifically enumerated federal exemptions.[9] And even if a defendant is legally deportable, immigration authorities have to place him in removal proceedings before he is deported. The Department of Homeland Security acknowledges that its limited resources curtail its ability to "remove all persons illegally in the United States." Memorandum from Jeh Charles Johnson, Sec'y, U.S. Dep't of Homeland Sec. to Thomas S. Winkowski et al., at 2 (Nov. 20, 2014), https://www.dhs.gov/sites/default/files/publications/14_1120_memo_prosecutorial_discretion.pdf. If the Executive Branch, ultimately responsible for instituting deportation proceedings, does not conclude that all deportable individuals will ultimately be deported, then it is presumptuous for a court to opine, as the Sixth Circuit did, that a defendant would have been deported "no matter what."[10]

Rejecting the initial plea permits the defendant to participate in the plea bargain negotiation process that might result in a more favorable plea. For exam-

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[8] Memorandum from John Morton, Dir., U.S. Immigration and Customs Enf't to All Field Office Dirs. et al., at 2, (June 17, 2011), https://www.ice.gov/doclib/secure-communities/pdf/prosecutorial-discretion-memo.pdf ("ICE, like any other law enforcement agency, has prosecutorial discretion and may exercise it in the ordinary course of enforcement."); *see also* Daniel A. Horwitz, *Actually,* Padilla *Does Apply to Undocumented Defendants,* 19 Harv. Latino L. Rev. 1, 7 (2016).

[9] *Id.* at 7–8.

[10] Horwitz, *supra,* note 8, at 10.

ple, the defendant may plead guilty under a different section of the penal code to preserve his eligibility for cancellation of removal, or he may plead guilty to a harsher charge and sentence to avoid certain immigration penalties. Mr. Lee reasonably could have rejected the initial plea deal in the hopes of negotiating a more favorable outcome given his desire to avoid deportation. See Pet'r Br. at 30–33.

III. "FUNNY THINGS HAPPEN" AT TRIAL.[11]

The Sixth Circuit's myopic resort to "nullification" also ignores the human flaws in such a system, including a prosecutor's potential failure to investigate facts sufficiently or to present them properly. "[T]he relative skill of lawyers certainly makes a difference at the trial and pre-trial stages, when a lawyer's strategy and ability to persuade may do his client a great deal of good in almost every case, and when his failure to investigate facts or to present them properly may result in their being excluded altogether from the legal system's official conception of what the "case" actually involves." *Jones* v. *Barnes*, 463 U.S. 745, 762 n.6 (1983) (Brennan and Marshall, JJ., dissenting). Most fundamentally, it ignores the reality that jurors following their instructions might take the prosecution's burden quite seriously and find that the highest burden in the law had not been met. Cf. *United States* v. *Orocio*, 645 F.3d 630, 643–44 (3d Cir. 2011), *abrogated on other grounds by Chaidez* v. *United States*, 133 S. Ct. 1103 (2013) (the "requirement that a defendant affirmatively show

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[11] *See, e.g.*, A Funny Thing Happened on the Way to the Forum (United Artists 1966) (the story of a Roman slave named Pseudolus and his many efforts to win his freedom by helping his master court the girl next door).

that he would [have] been acquitted in order to establish prejudice . . . is no longer good law.").

For all types of litigants, "there is no such thing as a sure winner . . . at trial" and "juries are inherently unpredictable." *Miller UK Ltd.* v. *Caterpillar, Inc.*, 17 F. Supp. 3d 711, 739–40 (N.D. Ill. 2014). Taking a case to trial may be more than just a "Hail Mary." See Pet'r Br. at 30. Instead, it is a key part of criminal procedure that has nothing to do with "whimsy" or "caprice," and everything to do with putting the government to its proof. *Strickland* v. *Washington*, 466 U.S. 668, 695 (1984).

Funny things happen on the way to, and at, the forum.[12] The annals of criminal law are replete with unexpected developments and shocking results in the courtroom. A variety of factors influence a jury verdict, or a non-verdict. Trial practices affect trial outcomes. For example, juror note taking practices, the jury's ability to ask the witnesses questions, the jury's opportunity to discuss evidence before deliberation, jury instructions, juror sequestration, and the length of the deliberations may affect the outcome of a trial. Paula L. Hannaford-Agor, *When all eyes are watching: Trial characteristics and practices in notorious trials*, 91 Judicature 197, 200 (2008). Mr. Lee may reasonably weigh these factors, as well as those that affect a hung jury, against accepting his plea bargain. See Paula Hannaford-Agor et al., *Why Do Hung Juries Hang?* 251 Nat'l Inst. Justice J. 25, 26–27 (July 2004). Many factors influence a hung jury, separate from jury nullification—the quality of the evidence, the degree to which jurors believe that the law they are instructed to apply is fair, and the jury deliberation process. *Id.* For example, a survey in the

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[12] *See, e.g.*, *supra*, note 11.

early 2000s revealed "39 percent of potential white jurors and 50 percent of potential black jurors would be 'very willing' or 'mostly willing' to acquit, despite evidence of guilt, in a first-time, nonviolent drug possession case." *DeBartolo*, 790 F.3d at 779 (citing Lawrence D. Bobo and Victor Thompson, "Racialized Mass Incarceration: Poverty, Prejudice, and Punishment," in *Doing Race: 21 Essays for the 21st Century* 343 (Hazel R. Markus & Paula Moya eds., 2010) (Fig. 12.9)).

Data shows that juries are inherently unpredictable. So do jury trials, themselves. In the case of O.J. Simpson,[13] the former NFL star was acquitted of the murders of his ex-wife, Nicole Brown-Simpson, and her friend, Ron Goldman in what is known as the "Trial of the Century." Dave DeLuca, *On Oct. 3, 1995: O.J. is acquitted*, Buffalo News (Oct. 3, 2016), http://buffalonews.com/2016/10/03/oct-3-1995-o-j-aquitted/. Contrary to the "mountain of evidence," and certainly the opinion of much of the public and press, the jury was not convinced by the prosecution's case. Timothy Egan, *NOT GUILTY: THE JURY; One Juror Smiled; Then They Knew*, N.Y. Times (Oct. 4, 1995), http://www.nytimes.com/1995/10/04/us/not-guilty-the-jury-one-juror-smiled-then-they-knew.html.

Pre-trial perceptions of the strength of the prosecution's case were also upended by the result in *State* v. *Zimmerman*.[14] George Zimmerman, a neighborhood watch leader, shot and killed Trayvon Martin, an unarmed black teenager. The acquittal engendered

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[13] *See People* v. *Simpson*, No. BA097211 (Cal. Super. Ct. Oct. 3, 1995).

[14] *See generally* Information, *State* v. *Zimmerman*, No. 1712F04573, 2012 WL 1207410 (Fla. Cir. Ct. Apr. 11, 2012).

astonishment. Defense counsel was able to point out inconsistencies in the testimony of the prosecution's star witness, Rachel Jeantel. See Adam Serwer, *Why George Zimmerman was acquitted*, MSNBC (July 14, 2013), http://www.msnbc.com/msnbc/why-george-zimmerman-was-acquitted; see also Chelsea J. Carter and Holly Yan, *Why this verdict? Five things that led to Zimmerman's acquittal*, CNN (July 15, 2013), http://www.cnn.com/2013/07/14/us/zimmerman-why-this-verdict.

In *People* v. *Powell* four Los Angeles police officers were acquitted of excessive force charges in the beating of Rodney King at the conclusion of a high-speed car chase. The encounter was caught on tape by a bystander, George Holliday, and played for the world to see by the media. See generally Robert Reinhold, *AFTER THE RIOTS; Judge Sets Los Angeles for Retrial Of Officer in Rodney King Beating*, N.Y. Times (May 23, 1992), http://www.nytimes.com/1992/05/23/us/after-riots-judge-sets-los-angeles-for-retrial-officer-rodney-king-beating.html?pagewanted=all. Post-trial analysis pointed not to nullification, but to the change in jury composition brought about by a change in venue. See *id.*

A jury may sympathize with the defendants and acquit, as one recently did in *United States* v. *Bundy*.[15] The jury in that case acquitted the Bundy brothers and other defendants of conspiracy and firearm charges, despite (or perhaps because of) the defendants' widely publicized, forty-one day armed occupation of the Malheur national wildlife refuge in protest against the U.S. Bureau of Land Management. Sam Levin and Lauren Dake, *Bundy Brothers found not guilty of conspiracy in Oregon militia*

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[15] No. 3:16-cr-00051-BR (D. Or. Oct. 27, 2016).

standoff, The Guardian (Oct. 27, 2016), https://www.theguardian.com/us-news/2016/oct/27/oregon-militia-standoff-bundy-brothers-not-guilty-trial.

Regardless of its sympathy for the defendant, a jury may be so averse to the prosecution that it finds a defendant innocent. The jury that declared Amy Carter, Abbie Hoffman, and thirteen other protestors who demonstrated against CIA recruiters at the University of Massachusetts innocent instead "found the CIA guilty of a larger crime than trespassing and disorderly conduct and decided [it] had a legitimate right to protest that." Carolyn Lumsden, *Amy Carter, Abbie Hoffman Acquitted*, Associated Press (Apr. 15, 1987), http://www.apnewsarchive.com/1987/Amy-Carter-Abbie-Hoffman-Acquitted/idbb87fa5908b15ecaf7bbecb46eea23b5 (quoting Amy Carter). The District Attorney in that case reflected, "If there is a message, it was that this jury was composed of middle America . . . Middle America doesn't want the CIA doing what they are doing." *Id.*

Mr. Lee could have reasonably taken his chances at trial in the hopes, however slight, of being tried before a jury sympathetic to his circumstances or hostile to the prosecution. This would have been a rational decision, especially considering another jury acquitted in an "iron-clad prosecution case" as a means to decry the enforcement of drug laws. Hon. Alex Kozinski, *Criminal Law 2.0*, 44 Geo. L.J. Ann. Rev. Crim. Proc. iii, xix (2015). Judge Kozinski of the Ninth Circuit remembers being "a bit shocked and entirely puzzled" when the jury acquitted the defendant, who had been caught with 10,000 imported ecstasy pills. Apparently, the foreman in that case thought the government was wasting taxpayer money in prosecuting that defendant, and he convinced the

rest of the panel to join his crusade against the war on drugs. *Id.*

Even where "rational" results may be expected or hoped for, litigation is anything but foreseeable as these well known cases demonstrate. Defendants are fully aware of the uncertainty of the criminal justice process—so is the government, and so are courts. See *id.* at xx ("[t]he simple truth is that our confidence in juries rests largely on faith . . . because there is no systematic feedback mechanism to help us figure out what works and what doesn't."). That uncertainty alone may make an election to place one's fate in the hands of "twelve angry men" a rational one. In that fictional trial, Henry Fonda's character, Juror 8, explains in the jury room: "Nobody has to prove otherwise. The burden of proof is on the prosecution. The defendant doesn't even have to open his mouth. That's in the Constitution." Twelve Angry Men (United Artists 1957).

It is not irrational for a defendant, aware of the inherent mercurial nature of the trial process, to forego a plea bargain that will make him deportable, no matter how slight his chance of prevailing at trial. See *Guzman*, 24 N.E. at 839; John Caher, *Tag Team of Lawyers Drawn to Alien's Plight*, 231 N.Y.L.J. 1 (2005) (describing a case in which a Jamaican national was acquitted at trial after vacating his guilty plea to felony drug charges based on his attorney's incorrect advice that the plea would render him deportable). By holding otherwise, the Sixth Circuit foreclosed Mr. Lee's "personal choice to roll the dice" and go to trial, an affront to his constitutional rights and to the jury process. See *DeBartolo*, 790 F.3d at 778; *Handbook for Trial Jurors Serving in the United States District Courts*, at 1–2, https://www.tnwd.uscourts.gov/pdf/content/PetitHandbook.pdf ("[j]urors

perform a vital role in the American system of justice.").

IV. PRESUMING THAT DEFENSE COUNSEL WILL USE STRATEGY AS A GUISE FOR INCOMPETENCE OFFENDS THE ETHICAL STANDARDS DEFENSE ATTORNEYS ARE BOUND TO UPHOLD.

Finally, the instant case is important for another reason; namely the Sixth Circuit's presumption that appellate courts may speculate with regard to a defendant's exercise of trial rights because otherwise "competent defense counsel [may] decide in some cases that acting incompetently [and not informing defendants of deportation risks] is better[.]" Cert. Pet. at 9a (emphasis omitted). Such reasoning, all too often expressed in judicial opinions,[16] flies in the face of the reality that defense counsel, like prosecutors, are officers of the court and are bound by a code of ethics.[17] See *ABA Standards for Criminal Justice:*

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[16] *See, e.g.*, *United States* v. *Flores-Mejia*, 759 F.3d 253, 263 (3d Cir. 2014) (en banc) (Greenaway, Jr., Smith, Shwartz, and Sloviter, JJ., dissenting, and Fuentes, J., joining in part); *United States* v. *Pielago*, 135 F.3d 703, 709 (11th Cir. 1998); *Dean* v. *Sullivan*, 118 F.3d 1170, 1172 (7th Cir. 1997); *United States* v. *Reyes*, 102 F.3d 1361, 1365 (5th Cir. 1996); *Rodriguez Rodriguez* v. *Munoz Munoz*, 808 F.2d 138, 149 (1st Cir. 1986); *Runnels* v. *Hess*, 653 F.2d 1359, 1364 (10th Cir. 1981).

[17] For example, established law requires the prosecution to provide material exculpatory evidence. *Brady* v. *Maryland*, 373 U.S. 83, 87 (1963) ("[w]e now hold that the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution."). Since *Brady*, the Court has expounded upon the obligation of a prosecutor to protect a defendant's right to a fair trial. *See, e.g.*, *Wearry* v. *Cain*, 136 S. Ct. 1002, 1006 (2016); *Banks* v. *Dretke*, 540 U.S. 668, 696 (2004) (explaining

Prosecution Function and Defense Function, Standard 4-1.2 (b) at 135 (Am. Bar Ass'n 1993, 3 eds.), http://www.americanbar.org/content/dam/aba/publications/criminal_justice_standards/prosecution_defense_function.authcheckdam.pdf (hereinafter "*ABA Standards for Criminal Justice*"). The Court has affirmed that "[t]he role of a prosecutor is to see that justice is done." *Connick* v. *Thompson*, 563 U.S. 51, 71 (2011); see also *Berger* v. *United States*, 295 U.S. 78, 88 (1935) ("[i]t is as much [the prosecutor's] duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one.").

Supplementing the ABA Standards are the ABA Model Rules of Professional Conduct that all attorneys are bound to uphold. Model Rule of Professional Conduct 1.4 (b) requires lawyers to explain matters to the "extent reasonably necessary to permit the *client* to make informed decisions regarding the representation" (emphasis added) and Rule 2.1 instructs lawyers to "exercise independent professional judgment and render candid advice . . . [meaning] a lawyer may refer not only to law but to other considerations such as moral, economic, social and political factors, that may be relevant to the client's situation." Rule 1.4(b)'s demand for client-centric representation reinforces what this Court recognized in *Padilla*—"incompetent advice distorts the defendant's decisionmaking process." See *Padilla*, 559 U.S. at 358.

Defense counsel must advise, communicate, and explain to the accused all developments and proposals in plea discussions. See *ABA Standards for*

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that the justice system is "a system constitutionally bound to accord defendants due process"); *Kyles* v. *Whitley*, 514 U.S. 419, 453-54 (1995); *Giglio* v. *United States*, 405 U.S. 150, 154 (1972).

Criminal Justice, Standard 4-6.2 (a)-(b) at 221. These ethical standards prohibit defense counsel from knowingly, indeed strategically, not telling their clients that a criminal conviction could lead to their deportation. This Court has acknowledged as much, finding it "virtually inconceivable that an attorney would deliberately invite the judgment that his performance was constitutionally deficient." *Kimmelman* v. *Morrison*, 477 U.S. 365, 382 n.7 (1986). In this case, however, the Sixth Circuit has relied upon precisely this "virtually inconceivable" and pernicious assumption.

The pursuit of fairness in our criminal justice system relies on the presumption that prosecutors, defense counsel, judges, and jurors will act in good faith. See *Banks*, 540 U.S. at 696 (quoting *Bracy* v. *Gramley*, 520 U.S. 899, 909 (1997)) ("[o]rdinarily, we presume that public officials have properly discharged their official duties"); *Schneiderman* v. *United States*, 320 U.S. 118, 164 (1943) (Douglas, J., concurring) (stating the assumption that the judge "acted in utmost good faith"). To presume otherwise, to even entertain the possibility that any of these actors would deliberately act in bad faith, cripples the adversarial process. Enough reasons exist to question the integrity of the criminal justice system without this Court's endorsement of a presumption of bad faith.[18] See *Gideon* v. *Wainwright*, 372 U.S. 335, 344 (1963) ("[f]rom the very beginning, our state and national constitutions and laws have laid great emphasis on procedural and substantive safeguards designed to assure fair trials before impartial tribunals in which every defendant stands equal before the law.").

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[18] Kozinski, *supra*, p. 14, at iii-xiii.

NACDL urges this Court to declare unsound, once and for all, judicial reasoning that rests on general assumptions of bad faith among members of the defense bar.

CONCLUSION

For the foregoing reasons, and those set forth in Mr. Lee's petition, the judgment of the Sixth Circuit should be reversed.

Respectfully submitted,

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